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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Attorney General may, consistently with Article II of the Constitution, assign full, final and unreviewable law enforcement authority to an "independent counsel" who is not subordinate to the Chief Executive, either through the chain of authority or "at-will" removability.

2. Whether the court of appeals ignored the plain language of 28 U.S.C. § 515, and cases construing that provision, when it excused the refusal of respondent's staff attorneys to meet the mandatory requirements of § 515 for becoming special employees of the Department of Justice.

3. Whether the court of appeals disregarded controlling precedent from this Court, in particular *Bowsher* v. *Synar*, when it refused to address the constitutionality of the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*

PARTIES TO THE PROCEEDINGS

Oliver L. North was an appellant in the court of appeals and is the petitioner here. Lawrence E. Walsh, Independent Counsel, was an appellee in the court of appeals and is the respondent here.

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IN THE

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OCTOBER TERM, 1987

No.

OLIVER L. NORTH,

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v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Oliver L. North, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 20, 1987.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted as Appendix A to this Petition. The opinion of the United States District Court for the District of Columbia is reprinted as Appendix B to this Petition. An earlier opinion and order of the court of appeals are reprinted as Appendix E and Appendix F hereto.

JURISDICTION

The opinion of the court of appeals affirming the district court's contempt citation was entered on August 20, 1987. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on October 23, 1987. A copy of the Order denying the petition for rehearing is reprinted as Appendix C to this Petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Appointments Clause of Article II, section 2 provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 515 provides:

> (a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.
>
> (b) Each attorney specially retained under authority of the Department of Justice shall be com-

missioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

STATEMENT OF THE CASE

Petitioner Oliver L. North challenges a final judgment of civil contempt for refusing to comply with a grand jury subpoena. Petitioner maintains that respondent Lawrence E. Walsh, Independent Counsel, and his staff have no lawful authority to appear before the grand jury, cause issuance of a subpoena, compel compliance with a subpoena, or otherwise exercise the power and authority of Executive Officers of the United States. Accordingly, petitioner submits, any subpoena whose issuance respondent and his staff have caused is invalid and must be quashed.

This case arises out of the independent counsel investigation of the "Iran/Contra" affair. On December 19, 1986, the Division for Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit (the "special court") entered an order pursuant to the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591-98 ("Ethics Act") (App. 87a-99a), appointing Lawrence E. Walsh as independent counsel and defining his jurisdiction. On January 23, 1987, the special court entered an order declaring that, under the Ethics Act, associate independent counsel are special government employees of a "separate special agency" and are not employees of, or subject to the control of, the Department of Justice.[1] On March 5, 1987, in response to a civil suit by petitioner challenging the constitutionality of the

[1] Order, Div. No. 86-6 (D.C. Cir., Div. for the Purpose of Appointing Independent Counsels, Jan. 23, 1987).

Ethics Act, Attorney General Edwin Meese promulgated a regulation, set out at 28 C.F.R. Parts 600 and 601 (App. 76a-86a), which purported to create an "Office of Independent Counsel: Iran/Contra" within the Department of Justice, and he appointed respondent to head that office. The regulation purported to authorize respondent to conduct an investigation of the same scope as the one that he was conducting under the Ethics Act.

Thereafter, the independent counsel and his staff caused issuance of a grand jury subpoena to petitioner. Petitioner moved to quash the subpoena on the ground that the independent counsel provisions of the Ethics Act are unconstitutional and that the independent counsel and his staff are therefore precluded from appearing before the grand jury, causing issuance of subpoenas, and otherwise exercising the authority of Executive Officers of the United States. The independent counsel responded, *inter alia*, that petitioner's claim was not ripe for review and that the so-called "parallel" appointment of respondent by the Attorney General obviated the need to reach the merits of the constitutional claim. Petitioner replied that the claim was properly presented, that the regulation did not obviate the need to address the constitutional issue, and that, in any event, the regulation was unconstitutional and that authority had not been properly delegated or accepted thereunder. The district court ruled that petitioner's constitutional challenge to the Ethics Act was not ripe for review, refused to address that claim on the merits, and ordered petitioner to comply with the subpoena. He declined, on the advice of counsel, and was ruled in contempt.

On appeal, a panel of the United States Court of Appeals for the District of Columbia Circuit reversed and held that petitioner's challenge to the legal authority of the independent counsel and his associates was ripe for review on the merits. *In re: Sealed Case*, 827 F.2d 776 (D.C. Cir. 1978) (App. 66a-73a). Recognizing that con-

stitutional issues should not be addressed unless necessary, the court of appeals remanded for the district court to consider the following questions, taking testimony as appropriate:

(1) whether the Attorney General had legal authority to delegate the powers which he purported to convey in the regulation set out at 52 Fed. Reg. 7270 (1987) (to be codified at 28 C.F.R. Parts 600 and 601), and if so, whether appropriate authority has been properly vested in Mr. Walsh and his associates; and

(2) whether any aspect of the relationship between the special division of this Court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid.

See Order, *In re: Sealed Case*, No. 87-5168 (June 8, 1987) (*per curiam*) (App. 74a-75a).

After briefing and oral argument—but no evidentiary hearing—on remand, the district court rejected petitioner's claim on the merits. It ruled (1) that "the parallel appointment of Mr. Walsh under the Attorney General's regulation was factually and legally valid"; (2) "that appropriate authority has been vested in [Mr. Walsh] and his associates"; and (3) that "the limited relationship between the Special Division of the Court of Appeals for this Circuit and the Office of the Independent Counsel does not require consideration of the constitutionality" of the independent counsel provisions of the Ethics Act. (App. 43a).

The court of appeals affirmed. The panel ruled that the independent counsel and his staff had lawful authority to cause issuance of the subpoena to petitioner pursuant to the Attorney General's regulation. The panel ruled, 2-1, that it therefore was not required to reach the merits of petitioner's challenge to the constitutional-

ity of the independent counsel provisions of the Ethics Act. In so holding, the panel rendered three significant decisions.

First, the court of appeals rejected petitioner's argument that the Attorney General's delegation of final and unaccountable law enforcement authority to the independent counsel created an Officer of the United States who had to be appointed, under Article II of the Constitution, by the President with the advice and consent of the Senate—and not by the Attorney General. According to the court, because the independent counsel "serves only for so long as the March 5, 1987, regulation remains in force," and because "[s]ubject to generally applicable procedural requirements, the Attorney General may rescind this regulation at any time," (App. 13a), the independent counsel is an "inferior Officer" whom the Attorney General, as the "Head[] of [a] Department[]," may appoint under the express terms of the Appointments Clause. In reaching this conclusion, the court expressly declined to consider the issue posed in *Nader* v. *Bork*, 366 F. Supp. 104, 108-09 (D.D.C. 1973)—that is, whether the Attorney General may lawfully rescind the regulation solely to remove an independent counsel, if the independent counsel would not have been removable under the restrictive removal provisions of the regulation. (App. 13a n.33). In substance, the court ruled that regardless of whether the independent counsel is removable at will by the Attorney General whose final authority he exercises, or by the President, he nonetheless is and remains an "inferior Officer."

Second, the court of appeals held that the independent counsel and his staff had adequately complied with the requirements of 28 U.S.C. § 515, which governs the appointment of private attorneys to exercise law enforcement authority. Section 515 expressly requires that special employees of the Department of Justice be "specially appointed," that they be "specifically directed" to con-

duct litigation, and that they take oaths of office. Petitioner argued that none of the associate counsel had ever received or accepted an appointment as an Officer of the Department of Justice, that none had taken an oath to an office within the Department of Justice, and that none had received specific direction to conduct litigation on behalf of the Department of Justice.

The panel acknowledged that "[i]t is less than perfectly clear whether associate counsel have formally accepted appointments under the regulation" (App. 15a-16a), and observed that there was no evidence that associate counsel had taken oaths of office under the regulation.[2] Nonetheless, the panel ruled that because of the purported identity of office between that established under the Ethics Act and that established under the regulation, an appointment and oath for one sufficed for the other as well: "by previously submitting the appointment and oath forms to the Special Division [pursuant to the Ethics Act], the associate counsel accepted appointments and took oaths identical to those that would

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[2] In fact, respondent had vigorously maintained that the Attorney General's regulation established an office *outside* the Department of Justice. The court of appeals flatly rejected this contention. *See* App. 12a n.31. In light of the independent counsel's vehement position, it is not surprising that the associate independent counsel refused to take oaths and to execute affidavits that would render them Officers of the Department of Justice.

On March 13, 1987, Associate Attorney General Stephen S. Trott had written to respondent informing him of the steps to be taken to appoint his staff under the regulation, including the requirement of appointment affidavits and an oath of office, and thereby to render them "officers of the Department of Justice." The Trott letter is reprinted as Appendix I hereto. (App. 100a). The associate counsel never executed the affidavits, or took the oaths as directed. The court of appeals dismissed this failure, stating "[t]here is no evidence in the record that the Department ever renewed the request made in General Trott's letter, . . ." (App. 17a n.40). The court of appeals failed to mention that petitioner's effort to present evidence on this precise issue was rebuffed by the District Court.

have been required under the regulation, in order to perform the same jobs in a functionally indistinguishable office to that established by the regulation." (App. 16a). For that reason, the panel ruled that no new appointment documents were required. Similarly, the panel ruled that the "specific[] direct[ion]" requirement of § 515 was met in the case of associate counsel because the Attorney General had created the office of Independent Counsel: Iran/Contra and provided it with the "identical powers and jurisdiction" as the office established by the Ethics Act. (App. 18a). The court did not address petitioner's argument that the offices established under the Ethics Act and the regulation are not identical, and that the independent counsel's independence under the two is quite different.

Finally, the court ruled, 2-1, that in light of respondent's authority to cause issuance of the subpoena under the regulation, there was no need to consider the constitutionality of the Ethics Act. Petitioner had argued that the independent counsel's freedom from the Executive under the Ethics Act (which permits the special court to overrule any removal decision by the Attorney General), and the independent counsel's consequent subservience to the special court as long as the Ethics Act remains in effect, compelled consideration of the lawfulness of that Act.

In partial dissent, Judge Williams concluded as an initial matter that the Attorney General enjoys complete legal freedom to remove an independent counsel by revoking the regulation. Thus he declined to consider the "more difficult case" (App. 32a) posed if the Attorney General's removal decision might be subject to judicial review, as the majority had suggested. Judge Williams further asserted that petitioner's challenge to the Ethics Act was ripe for review because of the "here and now" effect on respondent of the independence and security provided to the independent counsel by the judicial review provisions of the Ethics Act.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit's Ruling Upholding the Attorney General's Regulation Conflicts With Article II of the Constitution.

The Attorney General's appointment of an Officer to whom he has delegated final law enforcement authority, but over whose activities and tenure he exercises no control, is in sharp and direct conflict with Article II of the Constitution. The court of appeals' opinion upholding that unprecedented appointment and delegation of power cannot stand.

At issue is the authority of a team of attorneys recruited from the private sector to conduct a wide-ranging criminal investigation into matters involving this nation's most sensitive affairs without any accountability to or control by the Chief Executive or the Attorney General. The regulation at issue here, patterned on (although in significant ways different from) the regulation authorizing the Watergate Special Prosecution Task Force, currently serves as the model for delegations of law enforcement authority by the Attorney General to independent counsels pending resolution of challenges to the constitutionality of the Ethics Act. The awesome authority exercised by respondent and his staff in this matter, coupled with the recurrent offers and delegations of equivalent authority under the same scheme, renders the issue raised one of exceptional importance to the nation. The sharp conflict with the Constitution that is posed by the regulation and the ruling below renders the legal question presented one of exceptional importance to this Court as well.

1. When the Attorney General promulgated the regulation establishing the "Office of Independent Counsel: Iran/Contra" under the direction of an independent counsel to be appointed by the Attorney General, he purported to delegate to that independent counsel "full power and independent authority to exercise all investigative and

prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice" with respect to his broad mandate. 28 C.F.R. § 600.1(a). (App. 78a). This provision grants respondent final authority to make binding law enforcement decisions, while freeing him of any accountability to the President or the Attorney General. The Executive also is severely restrained under the regulation in its ability to remove the independent counsel. The independent counsel may be removed from office, other than by impeachment and conviction, "only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties." 28 C.F.R. § 600.3(a)(1) (App. 82a). Together, these provisions establish an Officer exercising core Executive authority and yet uncontrollable by and unaccountable to the Chief Executive.

In the court of appeals, petitioner argued that, if such an Officer may be appointed at all, he must be appointed by the President with the advice and consent of the Senate, and cannot lawfully be appointed by a department head.[3] The Appointments Clause of Article II establishes two classes of Officers of the United States. Certain Officers in the Executive Branch exercise sufficiently "significant authority," *see Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976), as to be "superior" or "principal" Officers whom the President constitutionally is required to ap-

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[3] Article II, § 2 of the Constitution expressly gives the appointment power to the President. It provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

point with the advice and consent of the Senate.[4] Other "inferior Officers" operate in subordinate positions and fall within the province of Article II's "excepting clause."[5] Congress may constitutionally delegate to the President, department heads, and (at least under some circumstances) courts of law the appointment of "inferior Officers," but it may not alter the method of appointing "superior" Officers. The key question therefore is whether the independent counsel established under the Attorney General's regulation is a "superior" Officer who must be appointed by the President with the consent of the Senate, or whether he is an "inferior Officer" who may be otherwise appointed as provided in Article II's "excepting clause." If he is a "superior" Officer under the regulation, his appointment by the Attorney General is clearly unconstitutional.

The dissenting opinion in the court of appeals recognized that the Attorney General's appointment of a private attorney to exercise final law enforcement authority, without being accountable to any Officer of the United States, might raise serious constitutional questions. *See* App. 31a-32a. The majority dismissed these concerns, however, on the ground that, while the Attorney General cannot remove his appointee at will, or control his actions, the Attorney General's regulation can be rescinded by the

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[4] The term "superior" is used to distinguish Officers who must be appointed by the President with the advice and consent of the Senate from those "inferior Officers" who need not be so appointed under the Appointments Clause, Art. 2, § 2, cl. 2. Although the term "superior" Officer does not appear in the Constitution, it is the term used by James Madison at the Constitutional Convention, *see* 2 *The Records of the Federal Convention of 1787*, at 627 (M. Farrand rev. ed. 1937), and by this Court in *United States* v. *Eaton*, 169 U.S. 331, 343 (1898), to describe such Officers.

[5] The "excepting clause" provides that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, § 2, cl. 2.

Attorney General "subject to generally applicable procedural requirements." (App. 13a). However, the court expressly declined to consider the nagging issue since *Nader* v. *Bork*, 366 F. Supp. 104 (D.D.C. 1973)—whether the Attorney General may lawfully rescind or amend the regulation in order to remove a particular appointee. (App. 13a n.33). In the court's view, it is enough that the regulation may be rescinded under some undefined circumstances to render the independent counsel an "inferior Officer," regardless of whether he is removable at will.[6]

2. Before the decision of the court of appeals, no case had ever considered and upheld the authority of the President, much less the Attorney General, to appoint an Officer to execute the laws who is not somehow subordinate to the Chief Executive, either through the chain of authority or through "at-will" removability. For two reasons, the ruling below upholding such an extraordinary appointment warrants review by this Court.

First, Article II vests Executive power in a President who is constitutionally entrusted to "take Care that the Laws be faithfully executed," and numerous cases hold that it is the special prerogative of the Executive to prosecute a criminal case. *See, e.g., United States* v. *Nixon*, 418 U.S. 683, 693 (1974). The Attorney General's regulation purports to delegate that authority to a person neither accountable to nor removable at will by anyone in the Executive Branch. Unless that regulation is con-

[6] A measure of the majority's broad view of the independent counsel's "independence" under the regulation is found in its discussion of why there was no need for the associate independent counsel to receive new appointments or take new oaths for that office. The majority repeatedly noted that the power and authority of the respondent is identical under the Act and the regulation. *See, e.g.*, App. 16a. The court thereby tried to have it both ways: to rule that the two offices are different in order to save the constitutionality of the regulation, but that the two offices are the same in order to excuse non-compliance with § 515. Clearly only one of these options can be correct.

strued so that it may be amended or rescinded at will by the President or a subordinate, it is unconstitutional.[7]

Any formal restraint on the Executive's control of the independent counsel violates the basic concept that Executive power centers in the Chief Executive. Every Executive Officer other than the independent counsel is in some way accountable to the Chief Executive. The Executive might in some respects be limited in his ability to remove inferior Officers,[8] but by definition he retains substantive control over their decisionmaking. Similarly, the Executive might delegate final decision-making authority to "superior" Officers, or to others who perform core Executive functions, but he constitutionally retains the ability to remove those Officers at will. *See, e.g., Myers* v. *United States*, 272 U.S. 52 (1926). In all cases the Chief Executive, who is accountable to the people, retains control over those "who were to act for him under his direction in the execution of the laws." *Id.* at 117, *quoted* in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 135-36 (1976). By upholding the delegation here regardless of whether the regulation is revocable or amendable at will, the court of appeals countenances the appointment of an "inferior Officer" who exercises unique and unprecedented Executive authority and tenure but is accountable to no one in the Executive Branch.

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[7] The delegation by the Attorney General of final substantive decisionmaking to respondent also violates 28 U.S.C. § 516, which provides that the conduct of litigation for the United States is reserved to Officers of the Department of Justice "under the direction of the Attorney General." The regulation purports to divest the Attorney General of all authority to direct litigation with respect to matters within the jurisdiction of the independent counsel.

[8] Thus, in *United States* v. *Perkins*, 116 U.S. 483 (1886), there was no suggestion that the President or his subordinates could not supervise, control, or reverse any action of the cadet engineer whose removal was at issue in that case, even though the cadet could not be discharged by a department head at will.

Second, if it is not amendable or revocable at will, the regulation also would violate the Appointments Clause, because it would purport to vest in an "inferior Officer" law enforcement power greater than that even of the Attorney General—who is a "superior" Officer appointed by the President with the advice and consent of the Senate and removable at will. The Attorney General cannot be permitted, through a regulation, to create an office with greater tenure than his own, assign to it final law enforcement authority, and appoint the Officer to fill that extraordinary post. Any such Officer must, if lawful at all, be a "superior" Officer who cannot be appointed by the Attorney General. Certainly no "inferior Officer" exercising Executive authority may be free from control by the Chief Executive. Yet it is the appointment of just such an Officer that the court of appeals has upheld.

The issue expressly reserved by the court of appeals—the lawfulness of a revocation designed purely to accomplish a goal not permitted by the regulation, such as removal of the occupant of the office, or his staff, or certain of his powers—underscores the problem with the D.C. Circuit's ruling. To be an "inferior Officer" (and therefore appointable by the Attorney General), the independent counsel must at a minimum be subordinate in some way to a "superior" Officer.[9] By the terms of the regulation, however, no "superior" Officer retains any power to review or redirect the independent counsel's actions or to substitute judgment for that of the independent counsel. The only possible source of control is the power to revoke or amend the regulation to remove

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[9] While petitioner maintains that absolute revocability does not necessarily render the independent counsel an "inferior Officer," any more than the removability at will of cabinet members or ambassadors renders them "inferior Officers," it is a minimum requirement. An officer with such final authority and tenure, who is more independent even than the Attorney General, cannot possibly be an "inferior Officer" under the Constitution.

the officeholder. If that control is not complete—if, for example, a court is free to rule that any decision to remove a particular Officer but not to terminate his office is arbitrary or capricious (*see* App. 13a n.33)—the ultimate responsibility for executing the laws no longer lies with the Executive. Any Officer on whose shoulders such power rests cannot conceivably be an "inferior Officer" within the meaning of the Appointments Clause, if his office is lawful at all.

3. No case remotely supports the creation of such an extraordinary office or the appointment of an "inferior Officer" to fill it. *United States* v. *Eaton*, 169 U.S. 331 (1898), the principal case upon which the court of appeals relied, merely upheld the temporary elevation of an "inferior Officer" (a vice consul) to the post of a "superior" Officer (a consul) to meet a temporary exigency created by the consul's illness. At all times, the appointee was removable at will from his post as consul. Respondent was not appointed to meet a "temporary exigency," and the court of appeals expressly declined to declare him removable at will. Moreover, the appointee in *Eaton* did not enjoy respondent's final authority, because he remained subject to direction by the President and Secretary of State.

Nor do any of the other cases of this Court cited by the D.C. Circuit support its holding. *See* App. 15a n.35 (citing cases).[10] The court stated that each case cited

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[10] In *United States* v. *Nixon*, 418 U.S. 683 (1974), the Court was not presented with, and did not address, the legality of the delegation of authority to the Watergate special prosecutor. The issue in *Nixon* was justiciability; the President did not challenge his Attorney General's authority to promulgate the regulation at issue. The other two cases cited by the court of appeals involve procedural due process, not delegations of final authority. *Service* v. *Dulles*, 354 U.S. 363, 366 (1957), held only that the Secretary of State's failure to comply with certain procedural regulations voided his dismissal of a foreign service officer. The case had nothing whatsoever to do with the delegation of final authority; at all times the Secretary of State or his subordinates retained final de-

"implicitly recognizes that an 'Officer of the United States' may lawfully delegate his or her authority to an 'inferior Officer.'" (*Id.*) In fact, none of the cited cases ruled on, much less upheld, the legality of a delegation of final and unreviewable substantive authority to an Officer not subject to supervision and not removable at will.

4. Given the paucity of case law in this critical area, clarification of the proper distinction between "inferior Officers" and "superior" Officers is much needed.

Few cases in this Court have addressed the fundamental issues surrounding this distinction. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court held that any federal appointee "exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2 of [Article II]." *Id.* at 126. That case established that the distinction between Officers and "mere employees" turns on the "significant authority" exercised. The Court has never directly considered, much less ruled on, the related questions posed here: whether the distinction between superior and inferior Officers similarly is defined by a substantive assessment of the authority and independence enjoyed by the Officer in question, as opposed to his title or other formalistic rule; and second, whether an Officer who exercises final and unaccountable authority may be an "inferior Officer."

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cisionmaking authority on substantive matters. Similarly, *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260, 265-67 (1954), held only that the Attorney General cannot sidestep procedural routes established for agency decisionmaking, even if the Attorney General retains final say as to the agency decision. In that case, the Attorney General had delegated his decisionmaking authority to the Board of Immigration Appeals while retaining his authority to review all decisions by the Board. The case provides no support for the validity of a regulation delegating away all authority and power of review.

Resolution of these questions would have immediate and significant ramifications on critical cases other than this one. Its disposition lies at the heart of the constitutional challenge to the independent counsel provisions of the Ethics Act, which currently is pending before the United States Court of Appeals for the District of Columbia Circuit. *In re: Sealed Case*, Nos. 87-5261, 5264, 5265 (argued September 16, 1987). Should that case be decided and presented to this Court for review, this case and that one should be considered and decided together.

Each of these cases presents significant constitutional issues affecting the authority of private attorneys to conduct wide-ranging criminal investigations of extraordinary magnitude and sensitivity, with serious and lasting implications for targets, witnesses, and the nation. The D.C. Circuit's unprecedented and unsupported ruling on these issues warrants this Court's careful attention.

II. The D.C. Circuit's Ruling That Associate Counsel Complied with 28 U.S.C. § 515 Eviscerates the Purpose of That Section and Conflicts With Decisions of Other Circuits.

The D.C. Circuit has effectively read out of 28 U.S.C. § 515 the section's three concrete requirements for appointment of a private attorney as a special employee of the Attorney General—that the attorney be "specially appointed," that he take an oath of office, and that he be "specifically directed" to conduct any litigation, including grand jury proceedings. The result is a ruling of critical significance to the control of private attorneys purporting to exercise the law enforcement powers of the Attorney General. The ruling is also at odds with virtually every other case arising under § 515, in each of which the courts have demanded actual compliance with the mandatory language of that provision.

Section 515, which authorizes the employment of special attorneys by the Attorney General, represented a

legislative response to the decision in *United States* v. *Rosenthal*, 121 F. 862 (C.C.N.Y. 1903), which held that the Attorney General was not authorized to appoint special attorneys to appear before the grand jury because the authorizing statute only empowered the Attorney General and his Officers to conduct and argue cases, not to appear before the grand jury. The statute thereafter enacted authorizes the conduct of "any kind of legal proceeding" by special attorneys, specifically including grand jury proceedings. However, under the statute, whenever those proceedings are to be conducted by any attorney other than the Attorney General, the person conducting them must be specially appointed to do so, must take an oath of office, and must be "specifically directed" by the Attorney General or his delegate. For whatever reason, respondent here deliberately chose not to follow these simple but critical steps after the regulation was promulgated. In the course of forgiving that failure, the D.C. Circuit has completely rewritten § 515 case law.

1. The D.C. Circuit ruled that the execution by associate independent counsel of appointment affidavits and oaths of office for the office of independent counsel *established under the Ethics Act* satisfied the § 515 requirement for an appointment and oath to the office established months later under the regulation. This ruling violates the language and purpose of § 515. The result is to void the requirements of an appointment and oath for counsel already employed elsewhere in the federal government and to free them from any obligation to acknowledge their duties as Officers *of the Department of Justice.*[11]

Section 515's oath and appointment provisions have an obvious purpose. They guarantee that there shall be

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[11] The ruling also violates 5 U.S.C. § 3331, which requires that any federal Officer elected or appointed to an office, other than the President, take a particular oath of office.

a finite list of persons purporting to conduct litigation on behalf of the Attorney General, and that each of those persons, in recognition of the power inherent in such an assignment, swears to abide by the rules and standards of conduct of the Department of Justice and to be accountable to the Attorney General. By deleting these requirements, the D.C. Circuit has upheld the authority of an unknown, unlimited number of attorneys to conduct litigation on behalf of the Department of Justice without acknowledging that obligation or pledging to meet it. The Department now has no record of the identities of its special attorneys, and the public now has no guarantee that those attorneys have acknowledged and will adhere to the standards of conduct governing such appointees. In simple terms, the control guaranteed by § 515 is missing. In a routine case, such a loss of control is potentially dangerous. Where the attorneys thus empowered also happen to exercise the final law enforcement authority of the Attorney General, as they do here, the departure from the rules is particularly troublesome.

An appointment or oath to one office does not carry over to another office. Judges of one federal court must, for example, take new oaths when appointed to a different court. Oaths sworn to discharge faithfully the duties of one office—in this case, the office established *outside* the Department of Justice under the Ethics Act—cannot conceivably apply to a different office in a different branch of government burdened with different chains of command and obligatory duties. The oath of office taken by all appointees includes a statement that "I will well and faithfully discharge the duties of the office on which I am about to enter." By its terms, it applies only to one office and to the duties of that particular office.

The office established under the regulation places the independent counsel's staff attorneys *within* the Department of Justice, rendering them precisely the people to

whom § 515 is meant to apply.[12] As Officers of the Department of Justice, they are subject to departmental standards of conduct and other obligations—duties they must acknowledge by receiving an appointment and taking an oath to an office within the Department. Although the associate independent counsel took the same oath as Justice Department officers, their oath referred to a wholly different office entailing different duties and obligations. The affidavits actually received and executed by associate independent counsel, under the Ethics Act, are not even Department of Justice appointment affidavits. They bear the heading "United States Courts" and, because they are not Department of Justice forms, require no acknowledgment of, or oath to obey, the requirements of a Department of Justice office. Since the appointments under the Ethics Act and under the regulation are to offices with distinct sources of power and disparate chains of authority, the oaths taken, although identical in language, are entirely different in substance. Any suggestion that an oath to one is "identical" to an oath to the other is plainly erroneous.

The D.C. Circuit's decision also vitiates the § 515 requirement of "specific direction." That requirement serves a critical purpose. Section 515 explicitly *denies* the Attorney General the authority to hire attorneys willy nilly to act for him, and it instead commands that the authority of each such appointee to conduct legal proceedings be specifically defined. *There is no evidence whatsoever* that any of the staff attorneys ever received specific direction from anyone to appear before the grand jury or to conduct any legal proceedings, as § 515 requires. The court of appeals nonetheless found "specific direction" to the staff attorneys in the definition of the juris-

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[12] As noted, *supra*, respondent has maintained that the regulation did not place him and his staff *within* the Department of Justice and, presumably for that reason, has elected not to follow the rules for appointments within the Department.

diction of the independent counsel found in the Attorney General's regulation. That definition of the prosecutorial jurisdiction of an unidentified independent counsel is not specifically addressed or applicable to the staff attorneys, and was not meant to specifically direct any and every attorney hired by respondent to do anything—certainly not to appear before a grand jury or conduct legal proceedings. In the regulation, the Attorney General delegated the authority to appoint and direct associate independent counsel. Specific direction to them had to come from the independent counsel himself, if from anyone. The jurisdictional portion of a regulation is a far cry from any form of "specific direction" previously upheld by any court.

There is no evidence and no reason to believe that respondent has ever directed his entire staff to carry out all of the functions he himself is authorized to carry out. Section 515 authorizes respondent to designate certain attorneys to appear before the grand jury, or to assign all to do so, but the decision must be made pursuant to § 515 as to which ones shall be so assigned. The statute at a minimum is meant to assure that the mandate of each special attorney be defined, not merely that his superior's office receive a general jurisdictional mandate. The D.C. Circuit eviscerates this requirement by holding that the mere definition of an office's jurisdiction suffices as specific direction for any and all special attorneys within it.

2. The D.C. Circuit's ruling wreaks havoc with the numerous existing cases that have heretofore demanded actual adherence to the requirements of § 515. No case known to counsel has ever held that the requirement of an oath of office may be met by previously having taken an oath to a different office in a different department of the government. No case known to counsel has ever held that the requirement of an appointment to a particular office may be met by previously having received an appointment to a different office in a different department

of the government. And no case known to counsel ever has held that the "specific direction" requirement of § 515 may be met without any oral or written assignment to a special employee to conduct particular kinds of court proceedings. The D.C. Circuit ruling is in direct and stark conflict with all other cases construing § 515.

In particular, cases in other Circuits readily establish that the direction to particular attorneys, and in particular to attorneys not previously within the Department of Justice, must be individualized and precise. Courts in other Circuits routinely inquire into the adequacy of a § 515 authorization letter and assure that it is sufficiently specific. Were no such specific direction required (whether oral or written)—were a mere appointment to an office with a particular mandate sufficient, as the D.C. Circuit held—there would have been no cause for such an inquiry. *See, e.g., United States* v. *Prueitt*, 540 F.2d 995, 1000-01 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975). Moreover, when a court finds the direction to conduct litigation in the special attorney's appointment letter to be inadequate, the result is to void actions of the special attorney thereunder. *See United States* v. *Huston*, 28 F.2d 451, 456 (N.D. Ohio 1928); *United States* v. *Goldman*, 28 F.2d 424, 426-31 (D. Conn. 1928); *United States* v. *Cohen*, 273 F. 620 (D. Mass. 1921). Unlike these cited cases, in which an appointment at least existed and the party attacked only the specificity of its direction, here petitioner focuses on the utter absence of any Justice Department appointment of the associate independent counsel at all.

The court of appeals' ruling marks a dramatic departure from § 515 case law, which uniformly demands strict adherence to the § 515 requirements—particularly for non-regular employees of the Department of Justice. Those cases establish, *at a minimum*, that specially hired counsel, who are not regular Justice Department attor-

neys, must actually be "specially appointed" and receive "specific direction" to conduct any kind of legal proceeding. *See In re Subpoena of Persico, supra*, 522 F.2d at 57, 66. Even regular Department of Justice attorneys must receive special appointments and specific direction if they are to act under the authority of the Attorney General. *Id.* Those cases had left no doubt that before counsel not previously authorized to act as attorneys on behalf of the Attorney General may do so, both the Attorney General and the appointee must take certain steps. The appointment, oath and any direction received for the prior federal appointment do not suffice.

United States v. *Balistrieri*, 779 F.2d 1191, 1207-10 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1490 (1986), on which the D.C. Circuit relied in part, is not to the contrary. In that case the special attorney had orally received specific direction, which later was confirmed in writing. He also had received an appointment as a special attorney, executed a duly notarized appointment affidavit, and taken the requisite oath. Here there is no evidence that any direction has been given, or that any appointment has been received or oath taken. But the court of appeals nevertheless has ruled that the requirements of § 515 have been met. As a matter of law this ruling is seriously flawed and sets the D.C. Circuit wide of the mark in the proper interpretation of § 515, thereby creating confusion and gaping holes in a key statutory provision.

III. The D.C. Circuit's Ruling Conflicts With *Bowsher* v. *Synar* and Forecloses Separation of Powers Challenges Based on Unconstitutional Tenure.

The D.C. Circuit's refusal to address petitioner's challenge to the constitutionality of the independent counsel provisions of the Ethics Act directly conflicts with this Court's decision in *Bowsher* v. *Synar*, —— U.S. ——, 106 S. Ct. 3181 (1986).

1. In *Bowsher* v. *Synar*, this Court considered the constitutionality of the Gramm-Rudman-Hollings Act and ruled that the "here and now" effect of that Act's provisions regarding removal of the Comptroller General required consideration of the constitutionality of those provisions even before those provisions actually were used. The Court went on to hold the Act unconstitutional because the provisions at issue, allowing for congressional instead of Executive removal of the Comptroller General, improperly rendered an Executive Officer subservient to Congress. Thus according to *Bowsher*, when possible defects in allegiance arising out of removal provisions implicate the separation of powers, there is an automatic inference of distorted conduct that warrants immediate review of the challenged provisions. Concrete evidence of the impact of the provisions on an Officer's behavior is not required; such an impact is constitutionally presumed to exist. The Court expressly rejected the argument "that consideration of the effect of a removal provision is not 'ripe' until that provision is actually used." *Id.* at 3189 n.5.

Petitioner argued below that the "here and now" effect of the removal provisions of the Ethics Act for the same reason compelled consideration of the constitutionality of that Act in this case. The removal provisions in the Ethics Act give respondent unique tenure and authority by insulating him from control by the Executive (even though he exercises core Executive functions) and rendering him subservient to the special court, which can review and overrule any exercise by the Attorney General of his limited removal authority. *See* 28 U.S.C. § 596 (App. 97a-98a). The Attorney General's regulation purports to track that language, *compare* 28 C.F.R. § 600.3 (App. 82a-83a) with 28 U.S.C. § 596 (App. 97a-98a). But, as the D.C. Circuit noted, the removal provisions of the Ethics Act and the regulation in truth are very different; the Attorney General, within some unde-

fined limits,[13] may remove the restraints on his removal authority under the regulation, but the independent counsel's independence from the Executive under the Ethics Act is permanent.

The D.C. Circuit rejected petitioner's argument by a 2-1 vote, holding that the removal provisions did not warrant review of the Act's constitutionality. The Court in *Bowsher* considered the impact of the Act's removal provisions *in the abstract*—without demanding a showing that those provisions had any impact on the Comptroller General's behavior—and held that the very fact of their existence necessarily diminished the Executive Officer's allegiance to the Executive, transferred it, as a matter of law, to Congress, and warranted immediate review. The D.C. Circuit refused to apply the same analysis here. Instead, the court charged that petitioner was required, but somehow had failed, to demonstrate how the Act's removal provisions in fact had affected the behavior of the independent counsel.

Any such showing is plainly impossible to make (and would have been equally so in *Bowsher*). *Bowsher* framed no such requirement, and the court of appeals here provided no insight into how it might be met. Nor did it provide any coherent basis for distinguishing *Bowsher*. In particular, it did not explain why the removal provisions of the Ethics Act—which essentially render the independent counsel free from all control other than that of the special court—do not diminish the independent counsel's allegiance to the Executive in precisely

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[13] Petitioner maintains that, unless the Attorney General has complete legal freedom to amend or revoke the regulation, the regulation cannot possibly be constitutional. If the regulation is so construed, that ruling would expand the difference between the two provisions immensely and render the impact of the Ethics Act even clearer.

the same way as the Gramm-Rudman-Hollings Act, and thereby require immediate review as in *Bowsher*.[14]

In a lengthy dissent, Judge Williams rejected the analysis and conclusion of the majority on this issue. He demonstrated how the majority opinion marked a clear departure from *Bowsher* and other cases of this Court and concluded that petitioner's challenge to the Act in fact is ripe for review. He argued that this Court long "has been ready to infer the prospect of distortions in conduct from the illegality in tenure, without more," citing *Bowsher*, *Buckley* v. *Valeo*, 424 U.S. 1, 113-18 (1976), and *Glidden* v. *Zdanok*, 370 U.S. 530, 533

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[14] Any suggestion that the existence of the Attorney General's regulation affects this analysis is entirely misplaced. Because of the significant difference between the removal provisions of the regulation (as construed either by the majority or the dissent) and the Ethics Act, the two alleged sources of authority operate quite differently on the respondent. As long as the Ethics Act remains in effect, any greater independence from, or loss of allegiance to, the Executive that derives from that Act will continue to affect the independent counsel's behavior and that of his staff. Thus, the incremental tenure provided by the Ethics Act warrants review of those provisions.

Bowsher posed a similar but in fact more difficult problem. As the Senate argued in that case, *see* App. 35a & n.4, even apart from the removal provisions at issue Congress retained control over the Comptroller General because it could amend the Act and remove him from office at any time. According to this argument, the congressional control in either instance was equal, and the existence of any separate congressional removal provision was therefore irrelevant. This Court was not swayed by that claim, no doubt because the special removal provision was intended to and had the effect of divesting the Executive of control and causing the Comptroller General to look instead to Congress for guidance and security. *See Synar* v. *United States*, 626 F. Supp. 1374, 1393 (D.D.C. 1986) (rejecting Senate argument on this ground). In the same way, the removal provisions of the Ethics Act are both intended to and have the effect of freeing the independent counsel of Executive control and causing him and his staff to look to the special court for guidance and security.

(1962). He further pointed out that this inference is absolutely necessary, given the impossibility of proving that an Officer's conduct is distorted by virtue of the manner in which he may (or may not) be removed from office.

2. Cases like this one, and like *Bowsher*, pose a choice for the courts: either to permit an inference that distorted conduct results from unconstitutional tenure provisions, or to altogether foreclose separation of powers challenges to such provisions. In *Bowsher*, this Court chose the former; in this case, the D.C. Circuit chose the latter.

The result of the D.C. Circuit's ruling is to prevent litigants in that Circuit from raising separation of powers challenges to an Act of Congress if they cannot demonstrate concretely how the challenged provisions currently affect the behavior of the Officer in question. Litigants subject to the coercive power of Executive Officers who, by virtue of unconstitutional removal provisions, owe their allegiance either to no one or to someone other than the Executive, will essentially have no recourse. The D.C. Circuit's analysis would apply with equal force, for example, in a case challenging the Ethics Act—even if no regulation were in effect. It would foreclose a challenge to that Act's removal provisions, absent some undefined proof of immediate effect on the behavior of the independent counsel. That result puts an end to separation of powers claims based on unconstitutional tenure provisions. It conflicts directly with both the holding of *Bowsher* regarding the ripeness of separation of powers claims and the *Bowsher* Court's sensitivity to the importance of such claims. Absent review, a ruling so patently at odds with this Court's precedent should not stand.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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Dated: November 27, 1987

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5247

IN RE: SEALED CASE

Appeal from the United States District Court
for the District of Columbia
(Misc. No. 87-00139)

Argued August 5, 1987

Decided August 20, 1987

Barry S. Simon, with whom *Brendan V. Sullivan, Jr.*, *Terrence O'Donnell* and *Nicole K. Seligman* were on the brief for appellant.

Paul L. Friedman, with whom *Guy Miller Struve* was on the brief for appellee.

James M. Spears, Deputy Assistant Attorney General, Department of Justice, with whom *Joseph E. diGenova*, United States Attorney, *Richard K. Willard*, Assistant Attorney General, *Robert Kopp*, *Douglas N. Letter*, *Thomas Millet* and *Harold J. Krent*, Attorneys, Department of Justice were on the brief for *amicus curiae*, United States, urging affirmance.

Before: RUTH B. GINSBURG, WILLIAMS and D.H. GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* D.H. GINSBURG.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* WILLIAMS.

D.H. GINSBURG, *Circuit Judge*: Lt. Col. Oliver North appeals an order of the district court holding him in contempt for refusing to comply with a grand jury subpoena. North challenges the contempt order on the ground that it was issued by a grand jury presided over by Independent Counsel Lawrence Walsh and his associate counsel who, North contends, lack the legal authority to conduct that grand jury proceeding. North can prevail only if we find that Walsh's investigation cannot rely on either of two claimed sources of authority: (1) the December 19, 1986, appointment of Walsh as an independent counsel under the Ethics in Government Act [1] (Ethics Act), or (2) the Attorney General's March 5, 1987, delegation of investigative and prosecutorial authority of his own to Walsh. North raises constitutional challenges to both sources of authority as well as statutory challenges to the Attorney General's delegation.

On remand from the previous appeal to this court, the district court upheld the authority of Walsh and his associate counsel under the Attorney General's appointment.[2] The district court also held that it was unnecessary to address the question of the constitutionality *vel non* of the independent counsel provisions of the Ethics Act. We affirm each holding as well as the district court's order of July 10, 1987, directing North to comply with the subpoena.

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[1] Pub. L. 95-521, Title VI, § 601(a), 92 Stat. 1867 (1978), as amended by Pub. L. 97-409, 96 Stat. 2039 (1983); Pub. L. 98-473, 98 Stat. 2030 (1984); and Pub. L. 98-620, 98 Stat. 3359 (1984) (codified as amended in 28 U.S.C. §§ 591-98 (1982 & Supp. III).

[2] *In re Sealed Case*, Civ. No. 87-0139 (D.D.C. July 10, 1987).

I. BACKGROUND

A. Appointment by the Special Division

Pursuant to the Ethics Act, 28 U.S.C. § 592(c)(1), the Attorney General on December 4, 1986, filed an application with the Independent Counsel Division of this court (the "Special Division") seeking the appointment of an independent counsel with jurisdiction

> to investigate whether violations of U.S. federal criminal law were committed by Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals acting in concert with Lieutenant Colonel North or with other United States Government officials, whether or not covered by the Independent Counsel provisions of the Ethics in Government Act, from in or around January 1985 (the exact date being unknown) to the present, in connection with the sale or shipment of military arms to Iran and the transfer or diversion of funds realized in connection with such sale or shipment. The independent counsel should have jurisdiction sufficiently broad to investigate and prosecute any and all violations of U.S. federal criminal law which his or her investigation may establish in this matter, and any related matters over which the independent counsel may request or accept jurisdiction pursuant to 28 U.S.C. § 594(e).

On December 19, 1986, the Special Division filed an order, pursuant to its authority under 28 U.S.C. § 593(b), appointing Walsh as independent counsel, thereby conferring upon him, within the jurisdiction it prescribed, "all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department," with exceptions not here relevant, pursuant to 28 U.S.C.

§ 594(a).[3] In exercising its authority under 28 U.S.C. § 593(b) to define the prosecutorial jurisdiction of the independent counsel, the Special Division granted Walsh jurisdiction beyond that requested by the Attorney General. Most significantly, the Special Division expanded the time frame of the inquiry into arms sales to Iran to include the period "since in or about 1984," rather than "from in or around January 1985," and the Special Division granted Walsh the additional jurisdiction to investigate "the provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984." Soon after the Special Division announced Walsh's appointment, the President issued a statement saying that "Mr. Walsh has my promise of complete cooperation, and I have instructed all members of my administration to cooperate fully with the investigation in order to ensure full and prompt disclosure." [4]

B. Appointment by The Attorney General

Exercising his authority under 28 U.S.C. § 594(a)(1), Walsh empaneled a grand jury in this district on January 28, 1987. On February 24, 1987, North filed a complaint claiming that the independent counsel provisions of the Ethics Act are unconstitutional, and seeking to enjoin the grand jury proceedings.[5] In response to this constitutional challenge to Walsh's authority, the Attorney General on March 5, 1987, promulgated a regulation designed "to assure the courts, Congress, and the American people that [Walsh's] investigation will proceed in a

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[3] Order, *In re Oliver North, et al.*, Div. No. 86-6 (D.C. Cir. December 19, 198[6]).

[4] 22 Weekly Comp. Pres. Doc. 1658 (1986).

[5] *North v. Walsh and Messe* [sic], Civ. No. 87-0457 (D.D.C.).

clearly authorized and constitutionally valid form regardless of the eventual outcome of [North's] litigation." [6]

In accordance with the Attorney General's expressed intent "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner," [7] the regulation established the "Office of Independent Counsel: Iran/Contra"—under the direction of an Independent Counsel to be appointed by the Attorney General—and delegated to that Counsel authority identical to that provided to an independent counsel by the Ethics Act.[8] The regulation also sets forth the jurisdiction of the "Independent Counsel: Iran/Contra" [9] in exactly the same terms employed by the Special Division in establishing the jurisdiction of Independent Counsel Walsh. The regulations' provisions relating to the removal of the "Independent Counsel: Iran/Contra" also largely parallel those found in the Ethics Act.[10] In particular, the regulation sets forth the same grounds for removal as does the Ethics Act,[11] and it provides that "an Independent Counsel originally appointed by court order shall have such rights of review as provided by said order and by section 596(a)(3) of Title 28 of the United States Code." [12] The provisions of the regulation

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[6] 52 Fed. Reg. 7270 (March 10, 1987) (to be codified as 28 C.F.R. Parts 600 and 601).

[7] *Id.* at 7271.

[8] *Compare* the following provisions of the Ethics Act, 28 U.S.C. §§ 594(a)-(g) *with* parallel provisions in the regulations, 28 C.F.R. § 600.1(a)-(g), 52 Fed. Reg. at 7271.

[9] 28 C.F.R. § 601, 52 Fed. Reg. at 7272-73.

[10] *Compare* 28 C.F.R. § 600.3, 52 Fed. Reg. at 7272; *with* 28 U.S.C. § 596.

[11] *Compare* 28 C.F.R. § 600.3(a)(1), 52 Fed. Reg. at 7272; *with* 28 U.S.C. § 596(a)(1)(A).

[12] 28 C.F.R. § 600.3(a)(3), 52 Fed. Reg. at 7272.

concerning "reporting and congressional oversight" and "relationship with components of the Department of Justice" are also virtually identical with parallel provisions in the Ethics Act.[13] The regulation also includes provisions that state:

> (a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code), or any order issued thereunder.
>
> (b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision.[14]

On March 5, 1987, the date the Attorney General's regulation was promulgated, Independent Counsel Walsh signed an Appointment Affidavit naming him Independent Counsel: Iran/Contra.

C. North's Challenges to Walsh's Authority

In response to the Attorney General's regulation of March 5, 1987, North filed on the following day a new complaint in district court,[15] which was later consolidated with his previously filed petition for injunctive relief. On March 12, 1987, the district court rendered its deci-

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[13] *Compare* 28 C.F.R. § 600.2, 52 Fed. Reg. at 7271-72, *and id.* at § 600.4, 52 Fed. Reg. at 7272; *with* 28 U.S.C. §§ 595 and 597, respectively.

[14] 28 C.F.R. § 600.5, 52 Fed. Reg. at 7272.

[15] *North v. Walsh and Meese*, Civ. No. 87-0626 (D.D.C.).

sion in both actions.[16] Citing *Younger v. Harris*, 401 U.S. 37, 46 (1970), for the proposition that "a party who seeks to enjoin a criminal investigation has a particularly heavy burden,"[17] the district court denied North's request that it enjoin the on-going grand jury investigation, stating that "Colonel North, like any other potential criminal defendant, can raise his objections by appropriate motions, *if* and *when* an indictment is entered."[18]

Subsequent to the district court's dismissal of his complaint seeking injunctive relief, the grand jury issued a subpoena to North, with which he refused to comply. The district court having thereupon held him in contempt, North appealed to this court. In support of the contempt order, Walsh and the Attorney General argued that North's challenge to the prosecutor's legal authority was no more ripe for review then than it had been when he sought civil injunctive relief raising the same challenge. We disagreed,[19] concluding that a recalcitrant

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[16] *North v. Walsh and Meese*, Civ. Nos. 87-0457, 87-0626 (D.D.C. March 12, 1987), *app. pending*, Nos. 87-5058, 87-5059 (D.C. Cir.).

[17] *Id.*, slip op. at 13.

[18] *Id.* at 20 (emphasis in original). This ruling was similar to one handed down by another judge and affirmed by this court, rejecting Michael Deaver's request, based on a virtually identical constitutional challenge to that presented by North, that Independent Counsel Whitney North Seymour, Jr. be enjoined from seeking Deaver's indictment from the grand jury empaneled to investigate his lobbying activities. *Deaver v. Seymour*, Civ. No. 87-0477 (D.D.C. March 11, 1987), *aff'd*, No. 87-5056 (D.C. Cir. March 17, 1987) (opinion issued June 15, 1987), *stay denied*, 55 U.S.L.W. 3641 (March 18, 1987) (Rehnquist, C.J., in chambers). *See also Deaver v. United States*, —— U.S. ——, 107 S.Ct. 3177, 3178 (1987) (Rehnquist, C.J., in chambers) ("There will be time enough for applicant to present his constitutional claim to the appellate courts if and when he is convicted of the charges against him.").

[19] *In re Sealed Case*, No. 8[7]-5168 (D.C. Cir. June 8, 1987).

witness' "claim that a subpoena was applied for and issued under the signature of unauthorized persons" [20] was ripe for review under *United States v. Ryan*, 402 U.S. 530 (1971) [,] which stated:

> If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id. at 532 (footnote omitted).[21] The factual record was inadequate, however, for us to determine whether Walsh and his associate counsel could rely solely on the grant of authority under the Attorney General's March 5, 1987, regulation as the legal basis for the subpoena issued to North. If the regulation provided such authority—and if that authority had been exercised by Walsh and his counsel—it appeared that we might not need to reach

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[20] *Id.*, slip op. at 5.

[21] For additional support, we noted that "issues analogous to appellant's have been litigated, and thus treated as ripe, in the contempt setting." *In re Sealed Case, id.*, slip op. at 5. This was in reference to the line of cases that includes *In re Persico*, 522 F.2d 41 (2d Cir. 1975), in which the Second Circuit reached the merits of a recalcitrant witness' contention that a subpoena was unlawful because, he argued, the "special attorney" for the Government had not been "specifically directed" by the Attorney General, in accordance with 28 U.S.C. § 515(a), to conduct the grand jury proceeding. *See In re Sealed Case*, slip op. at 5-6, and cases therein cited.

In holding that *Ryan* permits a grand jury witness to challenge the legal authority of a government attorney, we withheld judgment as to whether the Court intended the language in *Ryan* to overrule *Blair v. United States*, 250 U.S. 273 (1919), which held that a recalcitrant grand jury witness could not challenge the constitutionality of the underlying statute violation of which the grand jury was investigating. *In re Sealed Case, supra*, slip op. at 6-7.

the question of whether the Ethics Act provided an independent source of authority, a question that would have required us to address the constitutionality *vel non* of the appointment of an independent counsel by the Special Division pursuant to the provisions of the Ethics Act.

We therefore remanded the case to the district court for it to determine "whether the Attorney General had legal authority to delegate the powers which he purported to convey in the [March 5, 1987] regulation . . . , and if so, whether appropriate authority has been properly vested in Mr. Walsh and his associates." [22] In addition, because of our uncertainty about the precise application for this case of certain language in the Supreme Court's decision in *Bowsher v. Synar*, —— U.S. ——, n.5, 106 S.Ct. 3181, 3189 n.5 (1986), we also directed the district court to determine "whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid." [23]

After taking evidence, the district court "determined that the parallel appointment of Mr. Walsh under the Attorney General's regulation was factually and legally valid and that appropriate authority has been vested in him and his associates." [24] In response to our second question, the district court "also determined that the limited relationship between the Special Division . . . and the Office of Independent Counsel does not require consideration of the constitutionality of the [Ethics] Act." [25] This appeal followed.

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[22] Order, *In re Sealed Case*, No. 87-5168 (D.C. Cir. June 8, 1987).

[23] *Id.*

[24] *In re Sealed Case, supra* note 2, slip op. at 2.

[25] *Id.*

II. ANALYSIS

A. Appointment by the Attorney General

As we indicated when remanding the case to the district court, North in effect claims that the subpoena was "unduly burdensome or otherwise unlawful" because it had been "applied for and issued under the signature of unauthorized persons." [26] In accordance with the "well-established principle . . . that normally [a c]ourt will not decide a constitutional question if there is some other ground upon which to dispose of the case," [27] we address first North's contention that Walsh and his associate counsel did not derive the requisite authority from the Attorney General's parallel appointment of March 5, 1987. Because the "investigative and prosecutorial functions and powers" purportedly conveyed to the Office of Independent Counsel: Iran/Contra by the Attorney General's regulation include the power to conduct grand jury proceedings and to issue the type of subpoena in dispute here,[28] the only questions raised by this contention are whether the Attorney General's delegation is lawful and, if so, whether that delegated authority has in fact been exercised by Walsh and his associate counsel.

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[26] *In re Sealed Case*, *supra* note 22, slip op. at 5.

[27] *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). *See Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

[28] *See* 28 C.F.R. § 600.1(a), 52 Fed. Reg. at 7271, which provides that the "investigative and prosecutorial functions and powers shall include," *inter alia*, "[c]onducting proceedings before grand juries and other investigations," subsection (a)(1), and "[m]aking applications to any Federal court for . . . subpoenas[] or other courts orders," subsection (a)(7). We note also that the Department of Justice, *amicus curiae*, which is entitled to considerable deference in interpreting its own regulations, *see Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), has never maintained that either the grand jury proceeding or the specific subpoena before us exceeded the scope of the authority that the Attorney General delegated in the regulation.

i. Is the Attorney General's Delegation Lawful?

We have no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the "investigative and prosecutorial functions and powers" described in 28 C.F.R. § 600.1(a) of the regulation. The statutory provisions relied upon by the Attorney General in promulgating the regulation are 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515.[29] While these provisions do not explicitly authorize the Attorney General to create an Office of Independent Counsel virtually free of ongoing supervision, we read them as accommodating the delegation at issue here.[30]

Moreover, the Attorney General's delegation did not violate the Ethics Act, 28 U.S.C. § 597(a), which provides:

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[29] *See* 52 Fed. Reg. at 7270-72. Section 301 of Title 5 of the United States Code authorizes a department head to issue regulations. Sections 509, 510, and 515 of Title 28 outline the authority of the Attorney General. Section 509 vests in the Attorney General, with four exceptions not relevant here, "all functions" of other officers, employees, and agencies of the Department of Justice. Section 510 authorizes the Attorney General to delegate this authority to "any other officer, employee, or agency of the Department of Justice." Finally, section 515(a) authorizes the Attorney General to conduct "any kind of legal proceeding, civil or criminal, including grand jury proceedings . . . which United States attorneys are authorized by law to conduct," and it authorizes the Attorney General to delegate this authority to "any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law." Together, these provisions vest in the Attorney General the "investigative and prosecutorial functions and powers" described in the regulation, 28 C.F.R. § 600.1(a), and authorize him to delegate such functions and powers to others within the Department of Justice.

[30] In *U.S. v. Nixon*, 418 U.S. 683, 694-96 (1974), the Supreme Court presupposed the validity of a regulation appointing the Special Prosecutor, a position indistinguishable from the one at issue here.

> Whenever a matter is in the prosecutorial jurisdiction of a[n] independent counsel or has been accepted by a[n] independent counsel under [28 U.S.C. § 594(e)], the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter . . . except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

The Attorney General's power of appointment extends only to the Department of Justice; hence the Office of Independent Counsel: Iran/Contra is "within" the Department, though free of ongoing supervision by the Attorney General.[31] Walsh has acknowledged that his signing the appointment form under the regulation constitutes an "agree[ment] in writing" within the meaning of § 597(a). The purpose of that provision—preventing investigations by the Department of Justice which would duplicate and possibly impede the work of Independent Counsel—is preserved by the present arrangement.

North contends that the Attorney General's delegation of authority to the Independent Counsel violates the Appointments Clause of the Constitution, Art. II, § 2, which provides that the President

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[31] In his brief, Walsh disputes the district court's conclusion that—as he puts it—"under the regulation the Office of Independent Counsel is inside rather than outside the Department of Justice." Brief for Appellee Independent Counsel at 52. Walsh and his staff acknowledge that they are within, and claim the authority of, the Office of Independent Counsel: Iran/Contra established by the regulation. *Id.* at 43. They have argued, however, that the Attorney General had the authority, and used it, to locate this Office "outside" the Department of Justice. *Id.* at 52-63. Nonetheless, at oral argument they clearly stated that their arguments were made in the alternative and that if the court holds that this Office is "within" the Department of Justice, as we do, then they would not on that account abjure their authority under the regulation.

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Citing *Buckley v. Valeo*, 424 U.S. 1 (1976), North contends that, given the substantial authority delegated to him, the Independent Counsel: Iran/Contra is not an "inferior Officer" but an "Officer of the United States" [32] who may be appointed only by the President with the advice and consent of the Senate. North raises essentially the same contention with respect to the authority given to the independent counsel under the Ethics Act. We need not decide whether the Ethics Act creates such an "Officer of the United States," however, in order to conclude that the regulation does not. The crucial difference is that the Independent Counsel: Iran/Contra serves only for so long as the March 5, 1987, regulation remains in force. Subject to generally applicable procedural requirements, the Attorney General may rescind this regulation at any time, thereby abolishing the Office of Independent Counsel: Iran/Contra.[33] As a result, we

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[32] North consistently refers to Independent Counsel Walsh as a "superior Officer," which term is not to be found in the text of the Constitution; we prefer the words of the Framers to a tendentious neologism.

[33] In *Nader v. Bork*, 366 F. Supp. 104, 108-09 (D.D.C. 1973), the district court found arbitrary and capricious the October 23, 1973, rescission of the regulation creating the Office of Watergate Special Prosecutor, inferring from its repromulgation three weeks later that it was rescinded only to permit a result—the firing of Archibald Cox—that "could not legally have been accomplished

must conclude that the Independent Counsel: Iran/Contra "is charged with the performance of the duty of the superior [i.e., the Attorney General] for a limited time and under special and temporary conditions." *United States v. Eaton*, 169 U.S. 331, 343 (1898). As such, "he is not thereby transformed into the superior and permanent official," *id.*, but rather remains an "inferior Officer" whom the Attorney General, as the "Head[] of [a] Department[]," may appoint under the express terms of the Appointments Clause.[34] *See id.* at 343-44; *United*

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while the regulation was in effect under the circumstances presented." *Id.* at 109. *Cf. Vitarelli v. Seaton*, 359 U.S. 535, 545-46 (1959). We are not presented with similar facts here and thus need not decide whether that analysis was correct. Nor does the Attorney General's March 5, 1987, regulation require, as a condition of its rescission, the consent of the Independent Counsel: Iran/Contra. Accordingly, we need not decide either whether the district court in *Nader v. Bork* properly relied upon the alternative ground that the rescission was invalid because Cox had not consented to it, as the regulation purported to require. 366 F. Supp. at 108.

[34] Because the Attorney General created the Office of Independent Counsel: Iran/Contra and retains the authority to rescind his March 5, 1987, regulation, North's reliance on *Buckley v. Valeo*, 424 U.S. at 126 ("any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States' ") is misplaced. Unlike the Federal Election Commissioners in *Buckley*, the Independent Counsel: Iran/Contra derives his authority not by direct delegation from Congress, but rather through the Attorney General. Having been appointed by the President and confirmed by the Senate, the Attorney General was properly vested with the investigative and prosecutorial authority described in 28 U.S.C. § 509, and could delegate it to others "for a limited time and under special and temporary conditions." *United States v. Eaton*, 169 U.S. at 343.

For the same reason, North can derive no support from *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Myers v. United States*, 272 U.S. 52 (1926), which involve the constitutional limitations on the authority of Congress to place restrictions on the removal power of the President. The Supreme Court has long recognized that an agency may impose limits on its own exercise of discretionary authority to remove officers and em-

States v. Germaine, 99 U.S. 508, 509-10 (1878).[35]

ii. Has the Independent Counsel Properly Exercised the Authority Delegated?

North argues further that, "[e]ven assuming that the Attorney General had the authority to delegate the powers purportedly delegated under the regulation, that authority has not been properly vested in Mr. Walsh or his associate counsel, who are therefore acting without any lawful authority whatsoever."[36] North argues that neither Walsh nor his associate counsel may act pursuant to the regulation because the associate counsel have not formally accepted appointments in the Office of Independent Counsel: Iran/Contra[37] and both they and Walsh have not been "specifically directed by the Attorney General" to conduct the grand jury investigation, as required by 5 U.S.C. § 515(a). We address each argument in turn.

It is less than perfectly clear whether associate counsel have formally accepted appointments under the regu-

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ployees. *See Vitarelli v. Seaton*, 359 U.S. at 539-40; *Service v. Dulles*, 354 U.S. 363, 383-89 (1957).

[35] *See also United States v. Nixon*, 418 U.S. 683 (1974); *Service v. Dulles*, 354 U.S. at 366; and *United States ex rel Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954), each of which implicitly recognizes that an "officer of the United States" may lawfully delegate his or her authority to an "inferior Officer."

[36] Brief of Appellant at 21. Under Federal Rule of Criminal Procedure 6(d), an "[a]ttorney for the government . . . may be present while the grand jury is deliberating or voting." Rule 54 then defines "attorney for the government" to include "the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [or] an authorized assistant of a United States Attorney."

[37] Walsh accepted appointment as Independent Counsel: Iran/Contra when he signed the appointment and oath form to that effect on March 5, 1987.

lation.[38] The Attorney General delegated to Walsh the express authority to hire associate counsel. In a March 13, 1987, letter, Assistant Attorney General Stephen Trott wrote to Walsh that, "[i]n order to effectuate the appointment of your staff, you should have each employee complete the standard 'Affidavits of Appointment' form . . . and be sworn-in in the presence of a person designated in 5 U.S.C. § 2903."[39] The record contains no evidence that Walsh's associate counsel have taken any actions pursuant to Trott's request. North contends that the associate counsel therefore may act only in accordance with their previous appointments by the Special Division. Accordingly, North argues, any legal authority they possess proceeds from the Ethics Act, and not from the regulation.

Under the particular circumstances of this case, however, we find that appointment to the one office carries over to the other. The offices established under the Ethics Act and under the regulation have identical investigative and prosecutorial powers and jurisdiction. In addition, Walsh serves as Independent Counsel for each office, with the parallel authority to appoint associate counsel. Finally, the terms of the appointment and oath forms for the two offices are virtually identical. In sum, by previously submitting the appointment and oath forms to the Special Division, the associate counsel accepted appointments and took oaths identical to those that would have been required under the regulation, in order to perform the same jobs in a functionally indistinguishable office to that established by the regulation. Undoubtedly for these reasons, the Department of Justice accepts that the appointments and oaths made pursuant to the Ethics Act are sufficient as appointments and oaths of associate counsel within the Office of Independent Counsel: Iran/

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[38] 28 C.F.R. § 600.1(c), 52 Fed. Reg. at 7271.

[39] Exhibit 6 to Brief of Appellant.

Contra.[40] We agree with the district court that "[n]ew appointment documents, therefore, would have served no purpose, as associate counsel had already made the necessary representations and were bound to their responsibilities under the first set of forms.[41]

North also contends that the Attorney General failed to comply with the requirement of 28 U.S.C. § 515(a) that he "specifically direct[]" Walsh and his associate counsel to conduct a grand jury investigation. In so arguing, North relies upon the lack of any "letter of authority" from the Attorney General (or his delegate) to each attorney, which is customarily provided in order to define the scope of the grand jury investigation and identify the attorneys conducting it. Although the cases concerning compliance with section 515(a) almost uniformly involve a dispute over whether a particular "letter of authority" specifically authorized the investigation being conducted,[42] no court has held that section 515(a) requires that there be any "letter of authority" as such. In fact, as the Department of Justice emphasizes, the Seventh Circuit has recently held that an attorney was "specifically directed" to conduct a grand jury proceeding even though a "letter of appointment" had not been sent until after the indictment issued. *United States v.*

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[40] Brief on Behalf of Amicus Curiae United States at 16 n.7, 19-21. There is no evidence in the record that the Department ever renewed the request made in General Trott's letter of March 13, although it never received the affidavits as requested.

[41] *In re Sealed Case*, *supra* note 2, slip op. at 8-9 (footnote omitted).

[42] *See e.g.*, *United States v. Prueitt*, 540 U.S. 995, 999-1003 (9th Cir.), *cert. denied*, 429 U.S. 959 (1976); *United States v. Morrison*, 531 F.2d 1089, 1092 (1st Cir.), *cert. denied*, 429 U.S. 837 (1976); *Infelice v. United States*, 528 F.2d 204 (7th Cir. 1975); *In re Persico*, 522 F.2d 41, 56-66 (2d Cir. 1975); *United States v. Wrigley*, 520 F.2d 362 (8th Cir.), *cert. denied*, 423 U.S. 987 (1975).

Balistrieri, 779 F.2d 1191, 1207-10 (7th Cir.), *cert. denied*, 106 S.Ct. 1490 (1985).

We need not determine how we would decide *Balistrieri*, however, in order to resolve the case before us. In this case, no "letters of authority" were sent to Walsh and his associates, either before or after they began to act pursuant to the authority delegated by the Attorney General. What section 515(a) requires is a "specific direct[ion]"—not a "letter of authority." Congress imposed this requirement in order "to protect the government from abuse of discretion by a special attorney or unnecessary personnel expenditures by the Attorney General, not to limit the Attorney General's power to prosecute." [43] From the facts of this case, we conclude that a specific direction has been given, and that the purpose of the statute has been met.

It was the Attorney General, after all, who initially requested that the Special Division appoint an independent counsel. When the Special Division appointed Walsh, it delineated the jurisdiction of his investigation with considerable specificity. The President immediately responded to this appointment by pledging the "complete cooperation" of the executive branch.[44] Later, when North challenged the legal authority of Walsh's investigation, the Attorney General, in order "to assure the courts, Congress, and the American people that [Walsh's] investigation will proceed in a clearly authorized and constitutionally valid form," [45] specially created the Office of Independent Counsel: Iran/Contra, provided it with the identical powers and jurisdiction employed by the independent counsel appointed by the court, and appointed Walsh as Independent Counsel: Iran/Contra.

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[43] *In re Persico*, 522 F.2d at 63.

[44] *See supra* note 4 and accompanying text.

[45] 52 Fed. Reg. at 7270; *see supra* note 6 and accompanying text.

Accordingly, Walsh and his associate counsel have received, from the inception of their investigation, more than the usual and at least the necessary degree of "specific direct[ion]" required by statute. To find fault in the Department of Justice's failure to prepare "letters of authority" would be to demand the same duplicative effort as involved in requiring the associate counsel to submit appointment forms and take oaths, for a second time, in order to carry out their existing responsibilities within a functionally equivalent and in all material respects an actually identical office. We will not so exalt forms over substance.[46]

iii. Summary

The Attorney General promulgated the March 5, 1987, regulation in order "to make certain that the necessary investigation and appropriate legal proceedings can pro-

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[46] Finally, North contends that, even if Walsh and his associate counsel satisfied the requirements discussed in the text, their actions cannot be predicated upon that authority because, according to North, "Walsh has never purported to act pursuant to the regulation." Brief of Appellant at 21-22. We consider irrelevant Walsh's legally erroneous belief that the Attorney General may create offices outside the Department of Justice. *See supra* note 31. The only other evidence upon which North relies is Walsh's failure to proclaim in documents filed with the court that he was acting pursuant to authority derived from the regulation as well as from the Ethics Act. *See* Brief of Appellant at 34. We are persuaded, however, by Walsh's argument that "as a matter of law, because Independent Counsel has executed an appointment affidavit pursuant to the regulation as well as one pursuant to the statute, all actions taken by the Office of Independent Counsel have been taken pursuant to both the regulation and the statute." Brief for Appellee Independent Counsel at 43 (citations omitted). *See In re Sealed Case, supra,* note 2, slip op. at 9 n.9 ("That the Independent Counsel's office chose to consistently use the label assigned to it under the [Ethics] Act does not belie the Independent Counsel's assertion that every official action of his office was taken under both the Act and the regulation.").

ceed in a timely manner." [47] He possessed the legal authority, both constitutional and statutory, to create the Office of Independent Counsel: Iran/Contra. Walsh and his associate counsel have accepted appointments in that office, and their grand jury investigation complies with the "specific direct[ion]" they have received since December 19, 1986. As a result, the Attorney General's March 5, 1987, regulation has provided Walsh and his associated counsel with the legal authority necessary to conduct the grand jury investigation—and in particular, to issue the subpoena to North—regardless of whether they may also have such authority under the Ethics Act. Accordingly, because the subpoena North has received was "applied for and issued under the signature of []authorized persons," [48] it is not "unduly burdensome or otherwise unlawful." [49]

B. The Tenure Issue

In remanding the case, we asked the district court to determine "whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid." [50] As indicated above, we requested the district court to address this question because, upon initial inspection, we were unsure whether the Supreme Court's decision in *Bowsher v. Synar* required us to address the question of the constitutionality *vel non* of the removal provisions of the Ethics Act,[51] even though no one

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[47] 52 Fed. Reg. at 7271; *see supra* note 7 and accompanying text.

[48] *In re Sealed Case, supra* note 19, slip op. at 5.

[49] *United States v. Ryan*, 402 U.S. at 532.

[50] Order, *In re Sealed Case, supra* note 23 and accompanying text.

[51] The relevant provisions are found in 28 U.S.C. § 596(a):

(1) A[n] independent counsel appointed under this chapter may be removed from office, other than by impeachment and

alleges that the Attorney General is likely to seek Walsh's removal in the foreseeable future. In *Bowsher* the Court

> reject[ed the] argument that consideration of the effect of a removal provision is not "ripe" until that provision is actually used. . . . "[I]t is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." The Impeachment Clause of the Constitution can hardly be thought to be undermined because of non-use.

106 S.Ct. at 3189 n.5 (internal quotation marks and citation omitted).

In this case, the removal provisions in the Ethics Act and in the Attorney General's regulation are identical.[52] In general, they provide that the Attorney General may remove Walsh for cause only. What differentiates the two schemes is that the Attorney General may rescind or amend the regulation, thereby withdrawing the delegated authority or Walsh's security of tenure, whereas in order to effect the parallel result under the Ethics Act, the Congress and the President, or Congress overriding a veto, would have to legislate to repeal the statute, arguably a less likely development. North appears to argue that

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> conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.
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> . . .
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> (3) A[n] independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court [i.e., the Special Division] and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

[52] *Compare* 28 U.S.C. § 596 *with* 28 C.F.R. § 600.3, 52 Fed. Reg. at 7272. In particular, the grounds for removal are identical.

Walsh's more secure status under the Ethics Act, combined with the fact that under the Act's removal provisions, the court that appointed him would review his removal, creates in Walsh a "here-and-now subservience" to the Special Division and, under *Bowsher*, compels us to reach the merits of his constitutional challenge.[53]

In *Bowsher*, the constitutional claim was "ripe" because the removal provision, by making the Comptroller General the servant of the Congress and not of the President, necessarily had an immediate and real impact on how he performed his duties.[54] Under the Deficit Re-

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[53] Brief of Appellant at 37-38.

[54] As the district court in *Synar v. United States* perceptively observed, a similar analysis applied with respect to bankruptcy judges whose terms, under the Bankruptcy Code, expired after fourteen years. In explaining why the Supreme Court reached the constitutional challenge to that provision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the district court stated that:

> It is true, of course, that the expiration of fourteen years was certain to occur while in the present case congressional removal is not. But that is quite irrelevant to whether the two provisions differ in their immediate impact, so that one is more "ripe" than the other. The immediate impact in *Northern Pipeline* came not from the certainty of expiration of fourteen years, but from the bankruptcy judge's awareness of the possibility of non-reappointment. It is his presumed desire to avoid that possibility by pleasing the appointing power, just as in the present case it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.

Synar v. United States, 626 F. Supp. at 1392. In a similar vein, the district court analogized the "immediate effect" that Congress' latent removal power had on the Comptroller General to the effect that "an agency's . . . formal assertion (by rule) of the power" to "punish[] certain conduct" has on a party whose conduct is so regulated. *Id.* at 1393, comparing *Abbott Laboratories v. Gardner*.

duction Act, the Comptroller General's duties involved the question of how to allocate scarce government monies; as illustrated by the budget controversies from which that Act emerged, it is particularly in the context of fiscal policy that "th[e] system of division and separation of powers produces conflicts, confusion, and discordance . . . ." *Bowsher v. Synar*, 106 S.Ct. at 3187. In that context, too, one's institutional allegiance goes a long way, if not all the way, in determining how one acts: or, as is often said of such interbranch conflicts, where one stands depends upon where one sits. The three-judge district court opinion[55] on which *Bowsher* relied for its ripeness analysis makes the point that assertion of the authority to remove has an impact distinct from the mere possibility that an officer will in fact be removed.[56] "It is the prior assertion of *authority to remove* embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance" in making his day-to-day budgetary decisions under the Deficit Reduction Act. *Synar v. United States*, 626 F.Supp. at 1393 (emphasis added). Thus the Comptroller General—out of a "presumed desire to avoid removal by pleasing Congress"—would be significantly influenced in making decisions determining, in substantial part, whether the petitioners would receive anticipated federal benefits. *Id.* at 1392. So viewed, the Supreme Court in *Bowsher* was virtually compelled to conclude that the separation of powers question was ripe for review even though the removal provision had not been exercised and, in fact, might never be.[57]

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[55] *Synar v. United States*, 626 F. Supp. 1374 (D.D.C. 1986).

[56] *Citing Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

[57] We do not read *Bowsher*, however, to hold that the constitutionality of a statute is ripe for review any time a party raises a separation of powers claim. For example, suppose, improbably,

In contrast, while North claims to suffer a harm from the removal provisions of the Ethics Act that he challenges as unconstitutional, he does not identify any way in which this "here-and-now" effect is even arguably felt by him.[58] We have already held that the Attorney General's parallel appointment provides Walsh with the legal authority, independent of the Ethics Act, to conduct the grand jury investigation from which this case arises. In light of this parallel source of authority, any harm to North that is a sufficiently direct and immediate consequence of the Ethics Act must involve an investigative or prosecutorial activity that Walsh would not undertake if he depended for his authority *solely* upon the Attorney General's regulation. In other words, North could only feel an immediate impact from the Act's removal provisions at this juncture if Walsh, without the benefit of the Act, would not take a certain action out of fear that the Attorney General would rescind or amend

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that Congress transferred the National Weather Service from the Department of Commerce to the Administrative Office of the United States Courts, and that this prompted someone—perhaps an employee who had hoped to move up within the Commerce Department—to bring a declaratory judgment suit challenging the move on separation of powers grounds. In terms purely of when that issue would be "ripe" for judicial review, it is difficult to see how the change in allegiances occasioned by the move would realistically have any effect on how the Service's employees perform their duties. Accordingly, it would not be unreasonable for a court to consider such a declaratory judgment action unripe until a plaintiff complains of some conduct by the newly-moved Service that would likely have been different if it had remained within the Department of Commerce.

[58] Instead, North instances various *ex parte* contacts between Walsh and his associates and the Special Division. He has not made it clear, however, how he thinks these contacts adversely affect him here and now; *at most* he could be read to imply that, if the Special Division were ever to review Walsh's removal by the Attorney General, it would so identify itself with him as to bias its judgment. This implication is no more a present effect, however, than the hypothetical removal to which it relates.

the regulation in order to abolish or limit his authority thereunder, but with the Act in place does so act, disregarding the risk that the Attorney General will remove him or limit his authority because the Special Division acts as the guarantor of his authority under the Ethics Act.

There is not the slightest reason to believe, however, that Walsh would not have convened the grand jury and issued the challenged subpoena to North if the Ethics Act did not exist. The Attorney General, by creating the Office of Independent Counsel: Iran/Contra in the image of the independent counsel's office under the Ethics Act, intended that Walsh would conduct his investigation just as he would pursuant to his identical authority under the Ethics Act so that, even if the Act were held unconstitutional, its absence would not in any way impair Walsh's investigation or prosecutions. In fact, the Attorney General stated as much in the preamble to the regulation.[59]

Furthermore, even if Walsh had acted in a manner demonstrably beyond the Attorney General's delegation of authority, during the course of this investigation but apart from issuing this subpoena, it would be of no avail to North on this appeal. In accordance with the principles we announced in *Deaver v. Seymour*, and in our opinion remanding this case to the district court, North may litigate only the lawfulness of the specific subpoena issued to him, not that of such other investigative or procecutorial actions as Walsh may undertake.[60]

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[59] *See* 52 Fed. Reg. at 7270-71.

[60] As we said in *Deaver v. Seymour*, *see supra* note 18, and as the district court said in *North v. Walsh and Meese*, *see supra* note 16, courts do not, except in very limited circumstances not alleged here, entertain the claim of a person subject to a criminal investigation that the investigation is unlawful and must therefore be enjoined. Courts exercise this restraint because, as Justice Frankfurter explained, "[b]earing the discomfiture and cost of a prosecution

III. CONCLUSION

North appeals the district court's order holding him in contempt, challenging the legal authority of Independent Counsel Walsh and his associate counsel to conduct the grand jury that issued the subpoena with which he has refused to comply. We hold that Walsh and his associate counsel derive the necessary legal authority from the Attorney General's regulation of March 5, 1987, regardless of whether they also have this authority pursuant to their appointments under the Ethics Act. North's challenge to the subpoena does not make his constitutional challenge to the removal provisions of the Ethics Act reviewable at this time.[61]

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for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

In previously remanding this case to the district court, we found a narrow pre-indictment exception to this rule, under which a recalcitrant grand jury witness, such as North, may raise the claim that his or her subpoena was "applied for and issued under the signature of unauthorized persons." *In re Sealed Case, supra* note 19, slip op. at 5. This exception, though, was not intended to swallow the general rule barring judicial interference with the conduct of a grand jury proceeding. As a result, in asserting that the subpoena issued to him was "unduly burdensome or otherwise unlawful," *United States v. Ryan*, 402 U.S. at 532, North may raise only those issues that relate to the specific subpoena with which he refused to comply. He may not rely upon the fortuitous circumstance of receiving that subpoena to effect an end run around the rule we announced in *Deaver v. Seymour* and in so doing challenge the entire investigation.

[61] *Buckley v. Valeo* does not suggest a contrary result. In that decision, which involved a suit for declaratory judgment, the Supreme Court held ripe for review a separation of powers chalienge to Congress' appointment of Federal Election Commission members, 424 U.S. at 113-18, to whom Congress had given "extensive rulemaking and adjudicative powers" and "direct and wide ranging" enforcement powers over the conduct of political elections. *Id.* at 110-11. Moreover, the Court found that "the Commission ha[d] undertaken to issue rules and regulations," and that "[w]hile many

The judgment of the district court is therefore

Affirmed.

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of its other functions remain[ed] as yet unexercised," that exercise was nevertheless "all but certain." 424 U.S. at 116-17. Although the politically-related nature of the Commission's duties and the present exercise of some powers and the "all but certain" exercise of others might not in themselves render "ripe" the separation of powers claim in a declaratory judgment setting, the Court relied heavily upon the additional consideration that "Congress was understandably most concerned with obtaining a final adjudication of as many issues as possible" as swiftly as possible. *Id.* at 117. *Cf. Duke Power Co. v. Carolina Env. Study Group,* 438 U.S. 59, 82 (1978).

The configuration of factors that rendered the constitutional claim in *Buckley* ripe are not present here. Most importantly, whereas Congress expressed a desire for prompt review of the Federal Election Commission's authority, the Ethics Act contains no parallel provision. Moreover, as we have indicated, *supra* note 60, courts properly view declaratory actions such as that in *Buckley* with considerable disfavor in the criminal context; yet for the court today to reach North's constitutional claim would, as a practical matter, have the same effect as entertaining a declaratory action.

WILLIAMS, *Circuit Judge*, concurring and dissenting: I concur in the court's opinion insofar as it upholds the authority of Independent Counsel Walsh and his subordinates under the Attorney General's regulations creating "Independent Counsel: Iran/Contra" (the "Regulations"). I write separately on that issue only to explain why I regard any revocation of the Regulations as free from judicial review, a factor that greatly facilitates my agreement with the conclusion that Walsh's appointment under the Regulations can be squared with the Appointments Clause, Art. II, § 2.

I dissent from the court's conclusion in that Counsel Walsh's regulatory authority renders North's attack on the Ethics in Government Act unripe.

I. REVOCABILITY OF THE REGULATIONS

North contends that Counsel Walsh's tenure under the Regulations violates the Appointments Clause, Art. II, § 2, by constituting him a "superior officer" whose appointment is not made pursuant to that clause, *i.e.*, by the President with the advice and consent of the Senate. The court responds that since the Attorney General can rescind the Regulation "at any time," Majority ("Maj.") at 13, Counsel Walsh is merely filling a part of the office of the Attorney General " 'for a limited time and under special and temporary conditions,' " *id.* (citing *United States v. Eaton*, 169 U.S. 331, 343 (1898)). *Eaton* upheld the non-presidential appointment of a vice consul to temporarily wield all the powers of an ailing consul, even though Art. II, § 2 specifically identifies consuls as "superior officers." Accordingly, Walsh's similarly defeasible appointment is also valid. So far, I agree.

A premise of my sharing this conclusion is my belief that the Attorney General's revocation of the Regulations

would be unreviewable.[1] Such revocation would, I believe, be exempt from judicial review as a decision "committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982).

The Supreme Court has long recognized that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 7 Wall 454 (1869)) (other citations omitted); *see also United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). It recently reaffirmed this principle emphatically. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (agency decision not to enforce "presumptively unreviewable"); *Wayte v. United States*, 470 U.S. 598, 607 (1985) ("the Government retains 'broad discretion' as to whom to prosecute"). In both *Wayte* and *Chaney* the Court found judicial review peculiarly inappropriate. *See Wayte*, 470 U.S. at 607 ("the decision to prosecute is particularly ill-suited to judicial review"); *Chaney*, 470 U.S. at 831 ("the general unsuitability for judicial review of agency decisions to refuse enforcement").

The Court identified factors militating in favor of discretion and against review, all of which are applicable here. Assuming the existence of a "technical violation," *Chaney*, 470 U.S. at 831, enforcement decisions depend upon a multiplicity of concerns, all within the expertise of the agency: likelihood of success, relation to overall enforcement goals, and status within the agency's priori-

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[1] Of course superior officers are typically (and perhaps necessarily) dismissible by the President at will, so it may seem ironic to suggest that ease of dismissal facilitates upholding the appointment under the Regulations. But ease of dismissal by the Attorney General clearly establishes that Walsh is not a superior officer under the Regulations, thus reconciling his powers with the fact of his not having been appointed by the President.

ties. *Chaney*, 470 U.S. at 831-32; *Wayte*, 470 U.S. at 607. Such a decision involves an agency's comparison of expected cost and return for the particular case against the impact of deploying those resources elsewhere—a decision that can hardly be made without a grasp of the full range of enforcement possibilities before the agency. The administrator has this grasp (or should); a reviewing court does not. The Court further noted that judicial intervention into prosecutorial decisions "delays the criminal proceeding, threatens to chill law enforcement . . . , and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy." *Wayte*, 470 U.S. at 607; *see also Chaney*, 470 U.S. at 834.

The Attorney General's issuance or revocation of regulations such as the ones in question is similarly discretionary. In substance the Regulations simply implement his organization of his department. Such decisions, like the ones in *Chaney* and *Wayte*, turn on the relationship between numerous factors as to which the Attorney General is expert, and the courts are not. Again they revolve around agency resource allocation priorities: potentialities for administrative confusion or duplication, economies of effort deriving from characteristics of the decisions being made, and—perhaps most relevant to the present case—the *de facto* priorities that are likely to emerge from the structure. (Streamlined, special-focus sub-agencies are likely to be relatively single-minded; commitment of an issue to such a sub-agency is an assignment of special priority to the field in question.) The traditional presumption of nonreviewability of prosecutorial decisions applies by analogy here.

There are, to be sure, limits on the presumption of nonreviewability, but none that appears applicable to this case. Absent a claim that an agency decision was based on some impermissible factor—a belief that the agency lacked jurisdiction (or general policy amounting to total abdication), or unjustifiable criteria such as race or the

accused's exercise of statutory or constitutional rights, *see Chaney*, 470 U.S. at 833 n.4, 838; *Wayte*, 470 U.S. at 608—the only basis for finding reviewability would be congressional provision of guidelines detailed enough to provide the courts with "law to apply," and thus a basis for review. *Chaney*, 470 U.S. at 833; *see also Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

As in *Chaney*, the search for any "law to apply" is singularly unproductive. The sources of authority invoked by the Attorney General speak in the broadest imaginable terms: 5 U.S.C. § 301 (generally authorizing heads of departments to promulgate regulations); 28 U.S.C. § 509 (vesting in the Attorney General virtually all functions of "other officers" of the Department of Justice (*i.e.*, officers other than those specified in immediately prior sections)); *id.* § 510 (stating that the Attorney General "may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General"); *id.* § 515(a) (allowing the Attorney General, or any other officer of the Department, "or any attorney specially appointed by the Attorney General under law," to conduct various legal proceedings, including grand jury proceedings).

Accordingly, the revocation and promulgation of the Regulations appear committed to agency discretion by law.

This conclusion makes dismissal of North's Art. II, § 2 attack on the Regulations a comparatively simple matter. Given the Attorney General's complete legal freedom to dispose of Counsel Walsh by revocation of the Regulations, Walsh is no more a "superior officer" under the Regulations than was the vice consul appointed in *Eaton* to exercise consular duties until the executive removed him at its pleasure.

In view of my position on judicial review of revocation, I need not address the Art. II, § 2 issue that would be presented if such an act by the Attorney General were reviewable. It is plainly a more difficult case.

II. The Ripeness of North's Attack on the Act, Given the Validity of the Regulations

All members of the court agree that Walsh has valid authority under the Regulations.[2] The remaining question is whether, notwithstanding that authority, there is any occasion to consider North's attacks on Walsh's tenure under the Act. Under the doctrinal terminology of *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), the problem is whether the issue is "ripe."

North contends that, notwithstanding any authority under the Regulations, Walsh's incremental tenure under the Act—his independence of the executive and possible subservience to the Special Court and Congress[3]—is so great as to affect his conduct "here-and-now." Clearly the gulf between the two forms of legal tenure is huge. The Attorney General is legally free to sweep the Regulations aside at will. Under the Act, by contrast, the Attorney General must establish "cause," and, perhaps most important, must convince the Special Court that there has

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[2] At least for me, this is subject to a caveat based on possible intertwining of the Regulations with the Act. *See infra*, p. 13.

[3] North notes that the Special Court's decision to vest in the Independent Counsel far broader jurisdiction than that proposed by the Attorney General followed communications to the Special Court from members of the then minority of the Senate Judiciary Committee, urging such an expansion. Letter from Joseph R. Biden, Jr., *et al.* to Special Division for Independent Counsel (Dec. 9, 1986). The episode suggests a point that should be borne in mind throughout: the label "independent" is not necessarily descriptive of true relations. Power abhors a vaccum. Unhitching the Independent Counsel from the executive may make the office naturally prone to domination by the branch that represents its primary competitor.

been no error "of fact or law" in that finding. Thus the Special Court, which selected Walsh and might well be expected to view him as its protege, exercises effectively *de novo* review over dismissal. The Regulation affords gossamer tenure, the Act steel.

That the Act's incremental tenure is likely to affect Walsh's day-to-day, "here-and-now" conduct seems indisputable. As I read the cases, this likelihood permits one against whom the distorted authority is wielded to raise separation-of-powers challenges to the legislation creating the distortion. And this is true, I believe, even though the object of the exercise of authority (here North) cannot directly trace the injuring exercise (service of a *subpoena duces tecum*) to the distorting element of Walsh's authority.

In challenges to the authority of a non-Article III court on the grounds that the challenger is entitled to a court enjoying Article III's exceptional tenure provisions, the assumption that inadequate tenure may prejudice the challenger is so automatic that it usually goes unmentioned. *See, e.g., Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Palmore v. United States*, 411 U.S. 389 (1973); *Crowell v. Benson*, 285 U.S. 22 (1932); *cf. Ex parte Bakelite Corp.*, 279 U.S. 438 (1929). On at least one occasion, however, the Court explicitly stated that there was no need to inquire into the actual conduct of the decisiomaker, or to trace his or her rulings to influence from any institution on which, by virtue of the tenure arrangements, he or she might be dependent. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 533 (1962).

In *Bowsher* the Court extended this principle—automatic inference of distorting effects from unconstitutional tenure—from the context of claims to an Article III tribunal to that of a general separation-of-powers attack on an officer's tenure. It treated as "ripe" the issue whether Congress's power to remove the Comptroller General in-

validated its effort to vest certain executive powers in him under the Gramm-Rudman-Hollings Act (more formally, the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, 99 Stat. 1037, 2 U.S.C.A. § 901 *et seq.* (West Supp. 1987)). Ripeness was created, the Court found, by the Comptroller General's "here-and-now subservience" to Congress. 106 S. Ct. at 3189 n.5. (The footnote adopted the analysis of the district court, *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986), which relied explicitly on one of the Article III cases, *Northern Pipeline.*)

In evaluating the *Bowsher* Court's standards for linking the tenure defect to plaintiff's harm, one must examine the role of the Comptroller General under Gramm-Rudman. In each year the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") (the executive's and Congress's champions, respectively) were to prepare estimates of the deficit for the coming year. If the estimated deficit exceeded specified amounts, each director was to calculate program reductions pursuant to rules provided in the act. *See Synar*, 626 F. Supp. at 1377. They were to forward these estimates and program reductions to the Comptroller General, who was to issue his report on the same issues. He in turn was to forward that report to the President, who was bound to implement his findings. When the *Bowsher* action was brought, one round of this had occurred—through the issuance of a presidential implementing order. *Id.*

Among the plaintiffs was a union of government employees, whose cost-of-living adjustments (COLAs) had already been suspended, and were about to be canceled, pursuant to that order. *Id.* at 1380-81. Thus its members were injured by the operation of the act. But the union evidently made no effort to trace the size of the cutbacks emerging from the Comptroller General's edict to his subservience to Congress. If the CBO's deficit esti-

mates were larger than OMB's, thus compelling more severe cutbacks, neither court bothered to mention it. If OMB and CBO split on the union members' COLAs and the Comptroller General's decision leaned unduly toward CBO's, again neither court alluded to the point. Clearly neither considered direct evidence of the distorting effect necessary to the outcome.

Another feature of *Bowsher* is directly relevant here. The Senate, defending the Comptroller General's role, noted that his removal could occur only by means of a joint resolution, which to take legal effect would require either the President's approval or passage by two thirds of both houses. *See id.* at 1393 & n.21. Accordingly, it argued that the court need no more consider the removal provision than it need consider the obvious and omnipresent possibility that Congress might later pass a law purporting to remove him. The district court responded that the tenure provision had "the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance." [4] *Id.* at 1393.

The district court opinion thus manifests great sensitivity to the likelihood that subtle variations in the quality of tenure will affect conduct. In *Bowsher*, Congress's merely *signaling* its ability to discharge the Comptroller General was enough, even though the ability signaled was no more than what existed anyway. And neither the district court nor the Supreme Court demanded any showing whatsoever that the alleged illegality of the tenure would move the Comptroller General in a direction hostile to plaintiffs' interests.

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[4] The Supreme Court, though noting that the dismissal resolution could be vetoed, merely observed that the veto could be overridden. 106 S. Ct. at 3189-90 n.7. It did not address the similarity between Congress's asserted power to remove by resolution under the act and the underlying, inescapable possibility of its trying to do so by a new statute.

Buckley v. Valeo, 424 U.S. 1, 113-18 (1976), manifests the same approach. Parties expecting their interests to be affected by future rulings of the Federal Election Commission challenged the means by which its members were to be chosen, invoking both the Appointments Clause and more general separation-of-powers principles. Even though nothing whatsoever had happened to these parties (in contrast to North, who faces prison for non-obedience to the *subpoena*), the Court found the issue ripe. The Court broadly observed:

> Party litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.

424 U.S. at 117-18 (citing cases including traditional Article III cases, *Palmore* and *Glidden*). In *Buckley* the Court perceived the timing of the case as the primary problem and did not address the strength of the link between the defects in appointment process and the plaintiffs' expected injuries. Thus a fair reading of *Buckley* is that *Glidden*'s automatic inference of distorted conduct from defects in allegiance is of general applicability and not confined to claims to an Article III tribunal.

Thus not only the Supreme Court's standard treatment of Article III claims, but also *Bowsher* and *Buckley* support hospitable treatment for constitutional challenges to tenure arrangements (indeed, under *Buckley*, structural defects in allegiance generally). The Court has been ready to infer the prospect of distortions in conduct from the illegality in tenure, without more. The inference is hardly a wild leap. The maxim "Where you stand depends on where you sit" (your viewpoint depends on your position or interest) suggests folk recognition of the point. And the founders' adoption of Article III's extraordinary tenure arrangements reflects it at the most sophisticated level of political thought. (Perhaps judges'

sensitivity on the point stems from their being beneficiaries of Article III's unmatched tenure provisions.) What is most striking is the Court's willingness to draw the inference without specific proof—indeed without so much as a *hint* of connection.

But this willingness is by no means inexplicable. Despite widespread recognition of the causal link between allegiance and stance, it may rarely be susceptible of direct proof. In fact direct proof might often require embarrassing and inappropriate inquiries into thought processes, *cf. United States v. Morgan*, 313 U.S. 409, 421-22 (1941) (explaining impropriety of judicial inquiry into thought processes of administrators); *Wayte v. United States*, 470 U.S. at 607 (explaining harm that might flow from judicial inquiry into thought processes underlying prosecutorial decisions). As a result, insistence on proof would likely put courts to a choice between permitting such dubious inquiries or denying relief to claims based on unconstitutional tenure. The Supreme Court appears to have avoided that dilemma by making the inference of distorted conduct automatic.

Nor is the logic of the automatic inference confined to claims of entitlement to an Article III court. Whenever the Constitution is construed to forbid a given arrangement of tenure (or allegiance), courts may infer that the framers believed the arrangement would distort conduct; thus *Bowsher* and *Buckley*.[5]

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[5] At the ripeness stage, of course, the inference of distorting effect is drawn on the basis of an assumption *arguendo* that there is a substantive illegality. Once the merits are reached, obviously, the courts may uphold the challenged arrangement. *See, e.g., Palmore v. United States*, 411 U.S. 389 (1973); *Crowell v. Benson*, 285 U.S. 22 (1932); *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), *cert. denied*, 106 S. Ct. 1269 (1986). Nothing in this opinion should be understood to reflect any view on the merits of North's claim.

North's challenge to the Act is that it subjects him to coercive process by a man who is free to disregard constraints that would operate on a member of the executive branch. These constraints are at their core the presence of competing priorities, including not merely other possible lines of inquiry and offenses, but also the need for sensitivity to the inquiry's possible impact on foreign relations.[6] Walsh's subordinates have already, in open court, stated his position to be that in the event of any clash between his judgment on such matters, and that of the executive branch, he is the final judge. Exhibit 1 to Reply Brief for Appellant. Though North has not directly traced the *subpoena* to Walsh's utter freedom from the executive branch, the inference is more readily drawn than the similar inference in *Bowsher*, *Buckley*, or the Article III cases.

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The parties have not framed the issue in terms of standing, but we have an independent duty to satisfy ourselves that standing exists. Under the view taken by the Court in *Bowsher*, there can be little doubt that the three predicates of constitutional standing exist: North will suffer injury in fact either from going to prison or from being forced by that prospect to comply with the *subpoena duces tecum*; Walsh's *subpoena* is the direct cause of his injury; and a court order quashing the *subpoena* would redress his injury. *See Allen v. Wright*, 468 U.S. 737, 751 (1984).

It is useful, however, to explore some difficulties in this analysis, both to satisfy the standing inquiry and

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[6] Walsh enjoys full prosecutorial discretion within the rather large domain confided to him under the Regulation and Act: the potential impact of constitutionally questionable allegiances is correspondingly broad. In *Bowsher*, the discretion exercised by the Comptroller General, though enough to rank as "executive," 106 S. Ct. at 3191-92, was comparatively narrow, and the potential congressional influence correspondingly so.

to derive such light as it may shed on the ripeness issue. Walsh might argue (though he hasn't) that the illegality alleged (a faulty tenure arrangement) is not the cause of North's injury, pointing to his alternative authority under the Regulations. Similarly, quashing the *subpoena* may be a null remedy if Walsh, abjuring his authority under the Act and explicitly invoking only the Regulations, were to issue another one. A judgment quashing the *subpoena* would presumably leave him free to do so, even though it explicitly held the Act unconstitutional. Thus, North's claims of causation and redressability appear suspect under the typically rigorous standing inquiry. *See, e.g., id.; Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975).

In *Bowsher*, however, the Court's brief standing discussion (which basically incorporated the district court's analysis) indicates that for claims of unconstitutional tenure a relaxed concept of causation applies. *See Bowsher*, 106 S. Ct. at 3186; *Synar*, 626 F. Supp. at 1380-81. The district court found injury in fact (and, implicitly, the requisite causation) in the suspension of COLAs and in the prospect of their cancellation. *Synar*, 626 F. Supp. at 1380-81. It viewed this causal connection as enough, without any suggestion that the Comptroller General's disputed tenure actually caused his decision to be any more adverse to the union than it would have been if his tenure had been constitutionally correct.

The district court's analysis can readily be applied here: the contempt and the *subpoena* cause the harm, their extinction will redress it. But this does not answer the question that the district court neither posed nor answered: what is the causal link between the *illegality* (*i.e.*, that part of the legislation said to render it unlawful) and the harm? The answer to that question, I believe, must lie in the same reasoning developed in the ripeness context: that in the context of a constitutional

attack on tenure provisions, distorted conduct may be inferred automatically from faulty allegiances.

Redressability poses a slightly different problem. The district court found redressability in *Bowsher* in the fact that invalidation of the automatic deficit reduction process would prevent the impending cancellation of benefits. While under Gramm-Rudman's "fallback" provisions Congress might itself enact the cancellation, that possibility—patently a lesser risk—would not undermine the effectiveness of invalidating the provisions for automatic reduction. *See Synar*, 626 F. Supp. at 1381.

The present case is different. If quashing the *subpoena* and invalidating the Act were to leave Walsh completely free to proceed, would North's injury be redressed at all? The answer lies in the substantive rulings that would be possible if the court reached the merits. A court accepting North's arguments on the merits might find that the momentum of Walsh's investigation—built initially on the challenged tenure—would assuredly carry it forward to the identical point. If so, the court would have to consider whether there had been so great an intertwining of the Regulations with the Act as to call for invalidation of both. Such a remedy would, of course, leave the Attorney General free to repromulgate the Regulations (shorn, presumably, of their references to procedures under the Act). But the remedy would break the momentum, and negate the allegedly unconstitutional influence. As the panel majority finds no ripeness, and none of us has reached the merits, I need not try to resolve these issues. But I believe the analysis establishes that the selection of proper redress would turn on the conclusions reached by the court on the merits; there is no inherent obstacle to adequate redress.

* * * *

Where a person is the object of the exercise of authority by one whose tenure he seeks to challenge on constitu-

tional grounds (at least ones involving separation of powers), the courts are ready to infer that the allegedly defective tenure has played a significant role in bringing about that exercise of authority and its tendency to injure plaintiff. Here, the inference that North's predicament stems from the questioned tenure is at least as plausible as the parallel inference in *Bowsher* or the Article III cases, in my judgment far more so. *See also Buckley*, 424 U.S. at 113-18. Accordingly I believe his claim to be ripe and would reach the merits.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Miscellaneous No. 87-0139

IN RE: SEALED CASE

[Filed July 10, 1987]

MEMORANDUM AND ORDER

Lt. Col. North, Movant in this matter, challenges the authority of Lawrence E. Walsh and his associates to issue subpoenas and conduct proceedings before the grand jury investigating what has become known to the public as the Iran/Contra Affair. His Motion challenges the constitutionality of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985) (the Act), under which this Office of the Independent Counsel was originally created, and alleges infirmities with the parallel appointment of Mr. Walsh to the Office of Independent Counsel: Iran/Contra by the Attorney General. *See*, 52 Fed. Reg. 7270 (1987) (to be codified at 28 C.F.R. Parts 600 and 601). The United States Court of Appeals for the District of Columbia Circuit decided on June 8, 1987 that Movant's challenges are ripe for review. *In Re Sealed Case*, No. 87-5168 (D.C. Cir. June 8, 1987) (per curiam).

In the Order remanding this matter, the Court of Appeals instructed:

Because the judiciary should rule on the constitutionality of an Act of Congress only as a last resort, the district court must determine whether this case can be resolved on other grounds. In this respect the district court should first consider, taking testimony as appropriate,

(1) whether the Attorney General has legal authority to delegate the powers which he purported to convey in the regulation set out at 52 Fed. Reg. 7270 (1987) (to be codified at 28 C.F.R. Parts 600 and 601), and if so, whether appropriate authority has been properly vested in Mr. Walsh and his associates; and

(2) whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid.

Upon consideration of the evidence on these matters in the form of relevant documents and an affidavit from Associate Counsel Guy Miller Struve, this Court has determined that the parallel appointment of Mr. Walsh under the Attorney General's regulation was factually and legally valid and that appropriate authority has been vested in him and his associates. It is also determined that the limited relationship between the Special Division of the Court of Appeals for this Circuit and the Office of the Independent Counsel does not require consideration of the constitutionality of the act.

The Attorney General's Regulation

The Attorney General's Authority to Promulgate the Regulation

On March 5, 1987, the Attorney General promulgated a regulation creating an Office of Independent Counsel: Iran/Contra, defining its general powers and setting its

jurisdiction.[1] He relied on "the authority vested in (him) by 28 U.S.C. 509,[2] 510,[3] and 515,[4] and 5 U.S.C. 301,[5] and . . . the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution." 52 Fed. Reg. 7270, 7271 (March 10, 1987).

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[1] The regulation is attached hereto as exhibit 1.

[2] § 509. Functions of the Attorney General

All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General . . .

[3] § 510. Delegation of authority

The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

[4] § 515. Authority for legal proceedings; commission, oath and salary for special attorneys.

(a) The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States Attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

(b) Each attorney specially retained under authority of the Department of Justice shall be commissioned as special assistant to the Attorney General or special attorney, and shall take the oath required by law. Foreign counsel employed in special cases are not required to take the oath. The Attorney General shall fix the annual salary of a special assistant or special attorney at not more than $12,000.

[5] § 301. Department regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

The first question raised in this matter is whether the Attorney General had the authority to seek assistance from an Independent Counsel in the function of his official duties. The Court need not prolong the discussion of this issue as the Supreme Court acknowledged in *Nixon v. United States*, 418 U.S. 683 (1974), that the Attorney General has such authority. In discussing the regulation issued by the Attorney General which appointed the Watergate Special Prosecutor,[6] the Court wrote:

> Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United State[s] Government. 28 U.S.C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to these statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure.

Id. at 694. The authority and independence of the Watergate Special prosecutor was almost identical to that enjoyed by Mr. Walsh. Similarly, in *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973) the Court accepted that "the Attorney General derived his authority to hire (Special Prosecutor Archibald) Cox and to fix his term of service from various Acts of Congress". *Id.* at 108 (citing 5 U.S.C. § 301; 28 U.S.C. §§ 509-510). Although the Independent Counsel alleges other sources of the authority for the promulgation of the regulation, only the statutes expressly relied on by the Attorney General confer such power.[7]

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[6] 38 Fed. Reg. 14688 (1973).

[7] The Independent Counsel contends that Article II of the United States Constitution and "the Congressional intent manifested in the Ethics in Government Act" confer authority on the Attorney

Even in light of the above-cited precedent, Lt. Col. North argues that the Attorney General's regulation is unconstitutional because it limits the power of the Attorney General and the President to remove Mr. Walsh without cause. According to the regulation,

> "An Independent Counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity or any other condition that substantially impairs the performance of the Independent Counsel's duties."

52 Fed. Reg. 7270, 7272. This contention has also been addressed by the Supreme Court and this District Court. As the court noted in *Nader v. Bork*, *supra*, when it found the firing of Archibald Cox illegal as a violation of the Attorney General's regulation, "the Supreme Court has twice held that an Executive Department may not discharge one of its officers in a manner inconsistent with its own regulations concerning such discharge." 366 F. Supp. at 108 (citing *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957). In this case, like in *Nader*, the Attorney General has voluntarily limited the discretion of the Executive Branch to remove officials at will. This action does not violate the Constitution.

General to make the parallel appointment. It is clear that neither of these sources gives the Attorney General the power to create a new agency.

When the true source of the Attorney General's authority is recognized, as 28 U.S.C. §§ 509, 510, and 515 and 5 U.S.C. § 301, it is clear that the Office of Independent Counsel: Iran/Contra is within the Department of Justice, although it has the same degree of independence from the other components of the Department of Justice as the Office of Independent Counsel described in the Ethics in Government Act.

Once it is determined that the Attorney General may appoint an Independent Counsel to assist him in the execution of his duties, the focus of the Court's inquiry must turn to the specific facts of this case. Here, the Attorney General appointed as Independent Counsel to investigate the Iran/Contra affair the same individual who was already serving in the same capacity under the Ethics in Government Act. Lt. Col. North asserts that this appointment violates section 597(a) of the Act which provides:

> Whenever a matter is in the prosecutorial jurisdiction of a[n] independent counsel or has been accepted by a[n] independent counsel under section 594(e) of this title, the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594 (d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

Although the Office of Independent Counsel: Iran/Contra must be within the Department of Justice given the source of the Attorney General's authority to promulgate the regulation, the appointment of Mr. Walsh does not violate § 597(a). Attached as Exhibit 5 to the Memorandum of Independent Counsel is the Appointment Affidavit of Mr. Walsh as Independent Counsel under the regulation. Mr. Walsh's signature on this form indicates that he, although Independent Counsel under the Ethics in Government Act, consented to the Attorney General's appointment of him as Indepe..dent Counsel under the regulation. Mr. Walsh knew that the scope of his authority, the degree of his independence, and the particulars of his office under the regulation are identical with those under the Ethics in Government Act. Although he believed his new office to be outside the Department of Justice, his acceptance of the appointment under the regula-

tion indicated his consent to the precise set of duties and relationships described in the regulation. His execution of the appointment affidavit, therefore, satisfied the requirements of 28 U.S.C. § 597(a).

The Vesting of Authority Under the Regulation in Mr. Walsh and His Associates

Although the Court has held above that nothing in the Constitution or Statutes of the United States bars the appointment of Independent Counsel: Iran/Contra, the Court must determine whether this authority was properly vested in Mr. Walsh and his associates.

Lt. Col. North makes only one argument that Mr. Walsh himself was not properly vested with authority under the regulation—that he could not accept the position because he did not understand that his office would be within the Department of Justice. As stated above, Mr. Walsh was aware of the particulars of his new office when he accepted it. His misconception of where the office was located within the Executive Branch, therefore, did not negate his express acceptance of the appointment. Mr. Walsh's authority under the regulation is clear.

A more difficult question concerns the validity of Mr. Walsh's appointments of associate Independent Counsel.[8] The record is clear that none of Mr. Walsh's associates executed affidavits pursuant to their appointments under the Attorney General's regulation. Attached as Exhibit 3 to the Independent Counsel's memorandum, however, are the affidavits executed by associate counsel pursuant to their appointments by Mr. Walsh under the Ethics in Government Act.

Under usual circumstances, appointment documents executed with regard to one position do not satisfy the

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[8] Mr. Walsh had the authority to hire associate counsel pursuant to § 600.1(c) of the regulation (set forth at 52 Fed. Reg. at 7271).

requirements of appointment under another position. In this case, however, the duties, obligations and limitations of the two positions are identical. Additionally, the same individual was vested with authority to make the appointments under the regulations and the Act. New appointment documents therefore, would have served no purpose, as associate counsel had already made the necessary representations and were bound to their responsibilities under the first set of forms. Given the unique set of circumstances involved in this matter, including Mr. Walsh's execution of an appointment affidavit under the regulation, the Court concludes that associate counsel were also properly vested with authority under the Attorney General's regulation.[9]

The Special Court

As previously noted, the Court of Appeals instructed this Court to determine whether any aspect of the relationship between the special division of the Court of Appeals and the Independent Counsel requires consideration of the constitutionality of the Act. The Court concludes that it does not.

The Court has accepted an affidavit from Associate Independent Counsel Guy Miller Struve which outlines the contacts between the Independent Counsel and the Special Court. This affidavit makes clear that the Special

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[9] The manner in which the Office of Independent Counsel signed subpoenas and other documents during the course of this investigation is irrelevant to the determination of whether authority was properly vested in and used by Mr. Walsh and his associates under the regulation. Each action taken by Mr. Walsh and his associates could have been taken under the regulation or the Act. That the Independent Counsel's office chose to consistently use the label assigned to it under the Act does not belie the Independent Counsel's assertion that every official action of his office was taken under both the Act and the regulation.

Court has in no way interfered with the grand jury investigation at issue in this matter.

Turning to the provisions of the Act and the regulation regarding the Special Court, it is plain that they are extremely limited. First, under 28 U.S.C. § 592(c), the Special Division appoints the Independent Counsel at the request of the Attorney General. Because the Attorney General in this case chose to appoint the same individual under the regulation, the Court need not address the constitutionality of the appointment provision of the Act. With regard to the other provisions of the Act and the Regulation regarding the Special Division, none of them in any way involve the Court in the conduct of the grand jury's investigation. 28 U.S.C. § 595(b) and § 600.2(b) of the regulation impose a requirement on the Independent Counsel that it file a report with the Special Division. Pursuant to 28 U.S.C. § 596(b)(2), the Special Division may terminate the Office of Independent Counsel upon completion of its assigned tasks. Under 28 U.S.C. § 596 (a)(3) and § 600.3(a) of the regulation, the Special Division may review the Attorney General's decision to remove the Independent Counsel. (Under § 600.3(a)(2) of the regulation, the Attorney General must submit a report to the Special Division specifying the grounds for the removal of the Independent Counsel. Any court of competent jurisdiction may hear the Independent Counsel's case that he was wrongfully removed.) Finally, the Court has jurisdiction to grant attorneys' fees to certain subjects of an Independent Counsel's investigation under 28 U.S.C. § 593(g). Because none of these limited powers of the Special Court impermiss[i]bly involve it in the criminal investigation by the Independent Counsel, the Court finds it unnecessary at this time to consider the constitutionality of the Ethics in Government Act.

An appropriate Order accompanies this Memorandum. The Clerk shall file this Order under seal as it contains

matters occurring before the grand jury. *See*, Fed. R. Crim.P. 6(e); Local Rule 302.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
Chief Judge

DATE: July 10, 1987

EXHIBIT 1

28 CFR Parts 600 and 601

OFFICES OF INDEPENDENT COUNSEL, GENERAL POWERS AND ESTABLISHMENT OF INDEPENDENT COUNSEL—IRAN/CONTRA

AGENCY: United States Department of Justice.

ACTION: Final rule.

SUMMARY: This rule establishes an Office of Independent Counsel: Iran/Contra, to be headed by an Independent Counsel. This Office is to be established pursuant to the Attorney General's statutory authority, found in 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution. This authority is being exercised because of the pending lawsuit captioned *North* v. *Walsh and Meese*, D.D.C. No. 87-0457, which challenges the constitutionality of the appointment and activities of the Independent Counsel named pursuant to the Ethics in Government Act (28 U.S.C. 591 *et seq.*). The President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act. In addition, I note that I have already determined that this matter is appropriate for further investigation. In light of the President's views, I have found it advisable to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the *North* litigation. Thus, this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities. To the contrary, this rule is in-

tended to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner.

EFFECTIVE DATE: March 5, 1987.

FOR FURTHER INFORMATION CONTACT:

Thomas Barba, Counselor to the Assistant Attorney General, Civil Division, Room 3607, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, D.C. 20530. Telephone: (202) 633-5713. This is not a toll-free number.

List of Subjects in 28 CFR Parts 600 and 601.

Crime, Conflict of interests, Foreign Relations, Government employees, Arms and munitions, Military personnel, National Defense, Authority delegations (Government agencies).

By the authority vested in me by 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution, Title 28, Code of Federal Regulations, is amended as follows:

CHAPTER V—OFFICES OF INDEPENDENT COUNSEL

1. A new Chapter VI, entitled "Offices of Independent Counsel," is added immediately after Chapter V.

2. A new Part 600 is added as the first Part of Chapter VI, to read as follows:

PART 600—GENERAL POWERS OF INDEPENDENT COUNSEL

Sec.

600.1 Authority and duties of an Independent Counsel.

600.2 Reporting and congressional oversight.

600.3 Removal of an Independent Counsel, termination of office.

600.4 Relationship with components of the Department of Justice.

600.5 Savings provision: severability.

Authority: 28 U.S.C. 509, 510, and 515.5 U.S.C. 301: Article II of the United States Constitution.

§600.1 Authority and duties of an Independent Counsel.

(a) An Office of Independent Counsel shall be under the direction of an independent Counsel appointed by the Attorney General. An Independent Counsel shall have, with respect to all matters in his prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of Title 18 of the United States Code. Such investigative and prosecutorial functions and powers shall include—

(1) Conducting proceedings before grand juries and other investigations;

(2) Participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such Independent Counsel deems necessary.

(3) Appealing any decision of a court in any case or proceeding in which such Independent Counsel participates in an official capacity;

(4) Reviewing all documentary evidence available from any source;

(5) Determining whether to contest the assertion of any testimonial privilege;

(6) Receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) Making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6083, 6004, and 6005 of Title 18 of the United States Code, exercising the authority vested in a United States or the Attorney General;

(8) Inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

(9) Initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing information, and handling all aspects of any case in the name of the United States; and

(10) Consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) An Independent Counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of Title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (b) of section 594 of Title 28 of the United States Code.

(c) For the purposes of carrying out the duties of the Office of Independent Counsel, an Independent Counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of Title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition that that paid under subsection (c) of section 594 of Title 28 of the United States Code.

(d) An Independent Counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within the Independent Counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform the Independent Counsel's duties.

(e) An Independent Counsel may ask the Attorney General to refer matters related to the Independent Counsel's prosecutorial jurisdiction. An Independent Counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within the Independent Counsel's prosecutorial jurisdiction as established by this chapter. If such a referral is accepted, an Independent Counsel shall notify the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time.

(f) An Independent Counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) An Independent Counsel shall have full authority to dismisss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

§ 600.2 Reporting and congressional oversight.

(a) An Independent Counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of the Independent Counsel. These statements and reports shall contain such information as the Independent Counsel deems appropriate.

(b) (1) In addition to any reports made under paragraph (a) of this section, and before the termination of the Independent Counsel's office under this chapter, such Independent Counsel shall submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time, a report under this section.

(2) A report under this subsection shall set forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of the Independent Counsel which was not prosecuted.

(3) Unless prohibited by applicable law, an Independent Counsel may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as he deems appropriate.

(c) An Independent Counsel shall advise the House of Representatives of any substantial and credible infor-

mation which such Independent Counsel receives that may constitute grounds for an impeachment. Nothing in this chapter shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) Nothing in this chapter shall prevent the appropriate committees of the Congress from exercising oversight jurisdiction with respect to the official conduct of any Independent Counsel appointed under this chapter, and such Independent Counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

§ 600.3 Removal of an Independent Counsel; termination of office.

(a)(1) An Independent Counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties.

(2) If an Independent Counsel is removed from office, the Attorney General shall promptly submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report specifying the facts found and the ultimate grounds for such removal. The Attorney General will not object to the making available of the report to the public by the Committees or the division of the Court.

(3) To the extent otherwise permitted by law, an Independent Counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the United States Court of Appeals for

the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time, or any court of competent jurisdiction and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief; provided that an Independent Counsel originally appointed by court order shall have such rights of review as provided by said order and by section 596(a)(3) of Title 28 of the United States Code.

(b) An office of Independent Counsel shall terminate when (1) the Independent Counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of the Independent Counsel or accepted by such Independent Counsel under § 600.1(e) of this chapter, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (2) the Independent Counsel files a report in full compliance with § 600.2(b) of this chapter.

§ 600.4 Relationship with components of the Department of Justice.

(a) Whenever a matter is in the prosecutorial jurisdiction of an Independent Counsel or has been accepted by an Independent Counsel under § 600.1(e) of this chapter, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by § 600.1(d) of this chapter, and except insofar as such Independent Counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presenta-

tion as amicus curiae to any court as to issues of law raised by any case or proceeding in which an Independent Counsel participates in an official capacity or any appeal of such a case or proceeding.

§ 600.5 Savings provision, severability.

(a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code), or of any order issued thereunder.

(b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision.

3. A new Part 601 is added immediately after Part 600, to read as follows:

PART 601—JURISDICTION OF THE INDEPENDENT COUNSEL: IRAN/CONTRA

Authority: 28 U.S.C. 509, 510, and 515; 5 U.S.C. 301; Article II of the United States Constitution.

§ 601 Jurisdiction of the Independent Counsel: Iran/Contra.

(a) *The Independent Counsel:* Iran/Contra has jurisdiction to investigate to the maximum extent authorized by Part 600 of this chapter whether any person or group of persons currently described in section 591 of Title 28 of the United States Code, including Lieutenant Colonel Oliver L. North, other United States Government officials, or other individuals or organizations acting in concert with Lt. Col. North, or with other United States Govern-

ment officials, has committed a violation of any federal criminal law, as referred to in section 591 of Title 28 of the United States Code, relating in any way to:

(1) The direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, or persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) The direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or persons acting, or purporting to act as an intermediary in any transaction above referred to in paragraph (a)(1) of this section;

(3) The financing or funding of any direct or indirect sale, shipment or transfer referred to in paragraph (a)(1) or (2) of this section;

(4) The diversion of the proceeds from any transaction described in paragraph (a)(1) or (2) of this section to or for any person, organization, foreign government, or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) The provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

(b) *The Independent Counsel:* Iran/Contra shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Oliver L. North, and any person or entity heretofore referred to, developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal

criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

(c) *The Independent Counsel*, Iran/Contra shall have prosecutorial jurisdiction to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of section 1826 of Title 28 of the United States Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the federal criminal laws, in connection with the investigation authorized by Part 600 of this chapter.

Dated: March 5, 1987.

Edwin Meese III,
Attorney General.

[FR Doc. 87-5064 Filed 3-9-87; 8:45 am]

DEPARTMENT OF JUSTICE

28 CFR Part 601

Correction

In rule document 87-5064 beginning on page 7270 in the issue of Tuesday, March 10, 1987, make the following corrections:

1. On page 7271, in the first column, in the chapter heading, "Chapter V" should read "Chapter VI".

§ 601.1 [Corrected]

2. On page 7272, in the third column, the section designation "§ 601" should read "§ 601.1".

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5247

IN RE: SEALED CASE

AND CONSOLIDATED CASE 87-5168

Before: RUTH B. GINSBURG, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

[Filed Oct. 23, 1987]

ORDER

Upon consideration of the appellant's petition for rehearing, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5247

IN RE: SEALED CASE

AND CONSOLIDATED CASE 87-5168

[Filed Oct. 23, 1987]

Before: WALD, *Chief Judge;* ROBINSON, MIKVA, EDWARDS, RUTH B. GINSBURG, BORK, STARR, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG and SENTELLE, *Circuit Judges*

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Chief Judge Wald and Circuit Judges Mikva, Edwards, Bork, Starr and Sentelle did not participate in this order.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5247

IN RE: SEALED CASE

AND CONSOLIDATED CASE 87-5168

[Filed Nov. 9, 1987]

Before: RUTH B. GINSBURG, WILLIAMS and D. H. GINSBURG, *Circuit Judges*

ORDER

Upon consideration of appellant's motion to stay issuance of mandate and of the opposition thereto, it is

ORDERED, by the Court, that the motion is granted and the Clerk is directed to stay issuance of the court's mandate through November 27, 1987.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX E

REDACTED VERSION

[Filed August 20, 1987]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 87-5168

IN RE SEALED CASE

Appeal from the United States District Court
for the District of Columbia
(Misc. No. 87-00139)

Argued June 3, 1987

Decided June 8, 1987

Barry S. Simon, with whom *Brendan V. Sullivan, Jr.*, *Terrence O'Donnell*, and *Nicole K. Seligman* were on the brief, for appellant.

Paul L. Friedman, with whom *Lawrence E. Walsh*, Independent Counsel, and *Guy Miller Struve*, were on the brief, for appellee.

Before: STARR, SILBERMAN and D.H. GINSBURG, *Circuit Judges*

Per Curiam: This is an appeal of an order of civil contempt under 28 U.S.C. § 1826(a) (1982 & Supp. III

1985). On May 8, 1987, the District Court held appellant in contempt for refusing to comply with a grand jury subpoena dated April 7, 1987.

Appellant moved before the District Court to quash the subpoena pursuant to Federal Rule of Criminal Procedure 17(c), maintaining that the subpoena was rendered unlawful by virtue of its having been issued upon application of the Office of Independent Counsel and signed by two Associate Independent Counsel. The primary challenge advanced by appellant was that the statutory provisions establishing the Office of Independent Counsel, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985), violate constitutional principles of separation of powers.[1] The District Court did not pass on the claims, however, and entered a judgment of contempt, ordering appellant confined for the life of the grand jury or until compliance with the court's order. The court denied appellant's alternative motions for a stay and for bail pending appeal. See 28 U.S.C. § 1826(b).[2]

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[1] Appellee urges that, even if appellant's challenge is appropriately addressed at this time, any constitutional problem is cured by the Attorney General's appointment of him to a newly-created Office of Independent Counsel: Iran/Contra. *See* 28 C.F.R. §§ 600.1-.5, 601; *see also* 52 Fed. Reg. 7270 (1987) (announcing the new regulations). Appellant in turn raises a number of constitutional and statutory challenges to the Attorney General's appointment. *See* Reply Brief of Appellant at 3-17.

[2] Section 1826 reads, in relevant part, as follows:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

The issue before us is whether appellant's claims are appropriate for judicial resolution at this time. Independent Counsel argues that they are not, citing settled principles of law protecting the orderly functioning of a grand jury. *See, e.g., United States v. Calandra*, 414 U.S. 338 (1974); *United States v. Dionisio*, 410 U.S. 1 (1973). In Independent Counsel's view, any challenge to the authority of his office, *see* 28 U.S.C. §§ 49, 591-598, can be brought only after an indictment, if any, is returned. After indictment, the argument goes, appellant could raise his arguments in support of a motion to dismiss the indictment under Federal Rule of Criminal Procedure 12(b)(1) for "defects in the institution of prosecution." Independent Counsel relies upon a line of cases beginning with the Supreme Court's decision in *Blair v. United States*, 250 U.S. 273 (1919), to assert that except for issues of testimonial privilege, issues reviewable under express statutory authorization, *see, e.g., Gelbard v. United States*, 408 U.S. 41 (1972), and charges that the grand jury lacked *de facto* existence, *Blair*, 250 U.S. at 282, challenges to grand jury proceedings—in this case based on the asserted lack of authority of the Office of Independent Counsel—must await the completion of the grand jury's proceedings. Any intrusion before that time, the argument concludes, would work an unwarranted interference with those proceedings.

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(1) the court proceeding, or

(2) the term of the grand jury including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

Appellant, in contrast, maintains that his attacks are within the scope of Rule 17(c), which permits a challenge to a subpoena *duces tecum* as "unreasonable" or "oppressive." Accordingly, appellant asserts that he was entitled to obtain a ruling on his defenses from the District Court in the course of the court's ruling on his motion to quash. Although he admits that denial of a motion to quash under Rule 17(c) would not, standing alone, be a final, appealable order, *Cobbledick v. United States*, 309 U.S. 323 (1940), appellant argues that the District Court's subsequent order holding him in contempt rendered it final for purposes of appeal and properly reviewable. *See* 28 U.S.C. § 1826(b).

For the reasons that follow, we are persuaded that appellant's challenges are in fact appropriate for judicial resolution at this time. *First*, the United States Supreme Court has said as much. In *United States v. Ryan*, 402 U.S. 530 (1971), a unanimous Supreme Court reaffirmed the rule enunciated in *Cobbledick*, namely, that denials of motions to quash subpoenas are not ordinarily appealable. This holding was expressly founded on

> the necessity for expedition in the administration of the criminal law [which] justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal.

402 U.S. at 533. Thus, the Court squarely rejected the notion that a witness choosing the first course—compliance—should be afforded any appellate review. The witness had argued that "unless immediate review of the District Court's order is available to [the witness], he will be forced to undertake a substantial burden in complying with the subpoena, and will therefore be 'power-

less to avert the mischief of the order.'" *Id.* at 532 (quoting *Perlman v. United States*, 247 U.S. 7, 13 (1918)).

The Court found that the witness was not "powerless," however, since the second course—"resistance to th[e] order"—was always available. This course brought with it an adjudication of contempt, but also gave rise to an opportunity for appellate review. Following this latter course, then, would have allowed the witness to present his arguments:

> If, as he claims, the subpoena is unduly burdensome or otherwise unlawful, he may refuse to comply and litigate those questions in the event that contempt or similar proceedings are brought against him. Should his contentions be rejected at that time by the trial court, they will then be ripe for appellate review.

Id. (footnote omitted). *Ryan*'s teaching in this respect could scarcely be clearer or more on point.

Second, Congress itself has provided for appeals by contemnors that will, in some cases, occur during ongoing grand jury proceedings. In 1970, obviously long after *Blair* was decided, Congress enacted 28 U.S.C. § 1826, a comprehensive provision concerning recalcitrant witnesses in grand jury and judicial proceedings. The operative language of that provision empowers the District Court summarily to order the confinement of a witness when the witness "refuses without just cause to comply with an order of the court to testify or provide other information." *Id.* § 1826(a). Thus, under the statutory structure now in place, a witness may raise in contempt proceedings before the district court defenses amounting to "just cause" for noncompliance with the court's order. The witness may then secure appellate review of an adverse ruling.

In the context of a subpoena *duces tecum*, we believe the teaching of *Ryan* is that the witness has "just cause" when compliance would be "unduly burdensome or otherwise unlawful." *Ryan*, 402 U.S. at 532, *see also In re Brummitt*, 608 F.2d 641, 643 (5th Cir. 1979). In addition, it seems to us that the claim that a subpoena was applied for and issued under the signature of unauthorized persons would constitute a cognizable claim of undue burden or unlawfulness under *Ryan*. We are therefore convinced that appellant's argument satisfied the "just cause" requirement set out in section 1826 for defenses that may be interposed in contempt proceedings and on appeal from orders of contempt.

Third, issues analogous to appellant's have been litigated, and thus treated as ripe, in the contempt setting. The leading example is *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975). There, a witness subpoenaed to appear before a grand jury refused to answer certain questions concerning the identity of his employees. He was (twice) held in contempt and sentenced (the second time) to incarceration for the remainder of the grand jury's term. Persico challenged the contempt adjudication by attacking under 28 U.S.C. § 515(a) the validity of the commission held by the "Special Attorney" who directed the grand jury's investigation and upon whose application the subpoenas issued. In Persico's view, the "Special Attorney's" commission, which had been executed by an Assistant Attorney General, did not satisfy the statutory requirement that commissions contain a "specific direction" about the duties of a "Special Attorney." To the contrary, Persico argued, the commission held by the "Special Attorney" constituted a "roving authority." The Second Circuit, in a comprehensive opinion by District Judge Weinstein, examined and adjudicated the defense, rejecting it on the merits. The court did not require, as Independent Counsel would here, that Persico await the completion of the grand jury proceedings and

be indicted before mounting any challenge to the authority under which the subpoenas issued.

Other decisions are to the same effect. For example, the Eighth Circuit reached the merits of a contemnor's defense that a failure to comply with 28 U.S.C. § 515(a) resulted in an unauthorized prosecutor causing issuance of the subpoena underlying the contempt order. *DiGirlomo v. United States*, 520 F.2d 372 (8th Cir.) (Heaney, J.), *cert. denied*, 423 U.S. 1033 (1975). *See also In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *In re DiPiero*, 394 F. Supp. 1350 (E.D. Pa. 1975); *cf. In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1369 (6th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 938 (1979); *In re Patriarca*, 396 F. Supp. 859, 862-63 & n.6 (D.R.I. 1975). In neither *Persico* nor *DiGirlomo* was there any hint that the issue—whether the prosecutor appearing before the grand jury had authority to do so—was somehow unripe in the face of an order remanding the recalcitrant witness to jail.

This is not to say that an order of contempt permits a recalcitrant witness to advance and litigate any defense. *Blair*, for example, held that a witness confronting contempt cannot challenge the constitutionality of the statute violations of which the grand jury is investigating until the witness is indicted under the statute. Before indictment, the *Blair* Court reasoned, it is sheerest speculation to assume that the statute under attack would ever have a direct impact on the contemnor. The grand jury might issue no indictments at all, might indict persons other than the contemnor, or might indict the contemnor under a wholly different statute than the one challenged.

We need not here elaborate on the relationship (and apparent tension) between, on the one hand, *Ryan* and Congress' authorization of litigation (and appeals) under section 1826 and, on the other hand, the *Blair* line of

cases. *See, e.g., United States v. Calandra*, 414 U.S. 338. Suffice it to say that the case at hand falls squarely within the express language of the unanimous Court's opinion in *Ryan* and is entirely in keeping, as we see it, with section 1826. Under these circumstances, we cannot but conclude that, notwithstanding the undeniable importance of an orderly grand jury process, appellant's defenses to the contempt proceeding are now appropriate for judicial resolution.

For that reason, the District Court erred in declining to entertain appellant's contentions. We are therefore constrained to vacate the order of contempt filed May 8, 1987, and remand the case for further proceedings consistent with an order filed contemporaneously herewith and which is in the public record.

It is so ordered.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1986

Misc. No. 87-00139

No. 87-5168

IN RE SEALED CASE

Appeal from the United States District Court
for the District of Columbia

[Filed June 8, 1987]

Before: STARR, SILBERMAN and D.H. GINSBURG, *Circuit Judges*

ORDER

This case presents a challenge to the legal authority of Lawrence E. Walsh and his associates to conduct an investigation before a grand jury. Appellant argues that Title VI of the Ethics in Government Act, 28 U.S.C. §§ 49, 591-598 (1982 & Supp. III 1985), pursuant to which Mr. Walsh was appointed to the Office of Independent Counsel, is unconstitutional, and that Mr. Walsh

and members of his staff are not acting under a proper delegation of authority from the Attorney General. The district court denied relief without reaching the merits of appellant's claim. In an opinion issued today under seal, we hold that appellant's claim was ripe for judicial review and appealable, and that the district court erred in not reaching the merits of appellant's challenge. It is

ORDERED, by the Court, that the case is remanded to the district court with instructions to rule on the legal authority of Mr. Walsh and his associates. Because the judiciary should rule on the constitutionality of an Act of Congress only as a last resort, the district court must determine whether this case can be resolved on other grounds. In this respect the district court should first consider, taking testimony as appropriate,

(1) whether the Attorney General had legal authority to delegate the powers which he purported to convey in the regulation set out at 52 Fed. Reg. 7270 (1987) (to be codified at 28 C.F.R. Parts 600 and 601), and if so, whether appropriate authority has been properly vested in Mr. Walsh and his associates; and

(2) whether any aspect of the relationship between the special division of this court and the Independent Counsel requires consideration of the constitutionality of the statute even if the Attorney General's appointment is otherwise valid.

Per Curiam
For the Court:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX G

28 CFR Parts 600 and 601

OFFICES OF INDEPENDENT COUNSEL; GENERAL POWERS AND ESTABLISHMENT OF INDEPENDENT COUNSEL—IRAN/CONTRA

AGENCY: United States Department of Justice.

ACTION: Final rule.

SUMMARY: This rule establishes an Office of Independent Counsel: Iran/Contra, to be headed by an Independent Counsel. This Office is to be established pursuant to the Attorney General's statutory authority, found in 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution. This authority is being exercised because of the pending lawsuit captioned *North* v. *Walsh and Meese*, D.D.C. No. 87-0457, which challenges the constitutionality of the appointment and activities of the Independent Counsel named pursuant to the Ethics in Government Act (28 U.S.C. 591 *et seq.*). The President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act. In addition, I note that I have already determined that this matter is appropriate for further investigation. In light of the President's views, I have found it advisable to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the *North* litigation. Thus, this rule is not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities. To the contrary, this rule is intended to make certain that the necessary investigation

and appropriate legal proceedings can proceed in a timely manner.

EFFECTIVE DATE: March 5, 1987.

FOR FURTHER INFORMATION CONTACT:

Thomas Barba, Counselor to the Assistant Attorney General, Civil Division, Room 3607, U.S. Department of Justice, 10th Street and Pennsylvania Avenue, NW., Washington, DC 20530. Telephone: (202 833-5713. This is not a toll-free number.

List of Subjects in 28 CFR Parts 600 and 601.

Crime, Conflict of Interest, Foreign Relations, Government employees, Arms and munitions, Military personnel, National Defense, Authority delegations (Government agencies).

By the authority vested in me by 28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution, Title 28, Code of Federal Regulations, is amended as follows:

CHAPTER V—OFFICES OF INDEPENDENT COUNSEL

1. A new Chapter VI, entitled "Offices of Independent Counsel," is added immediately after Chapter V.

2. A new Part 600 is added as the first Part of Chapter VI, to read as follows:

PART 600—GENERAL POWERS OF INDEPENDENT COUNSEL

Sec.

600.1 Authority and duties of an Independent Counsel.

600.2 Reporting and congressional oversight.

600.3 Removal of an Independent Counsel, termination of office.

600.4 Relationship with components of the Department of Justice.

600.5 Savings provision: severability.

Authority: 28 U.S.C. 509, 510, and 515, 5 U.S.C. 301; Article II of the United States Constitution.

§600.1 Authority and duties of an Independent Counsel.

(a) An Office of Independent Counsel shall be under the direction of an Independent Counsel appointed by the Attorney General. An Independent Counsel shall have, with respect to all matters in his prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of Title 18 of the United States Code. Such investigative and prosecutorial functions and powers shall include—

(1) Conducting proceedings before grand juries and other investigations;

(2) Participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such Independent Counsel deems necessary;

(3) Appealing any decision of a court in any case or proceeding in which such Independent Counsel participates in an official capacity;

(4) Reviewing all documentary evidence available from any source;

(5) Determining whether to contest the assertion of any testimonial privilege;

(6) Receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) Making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of Title 18 of the United States Code, exercising the authority vested in a United States or the Attorney General;

(8) Inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General; and

(9) Initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing information, and handling all aspects of any case in the name of the United States; and

(10) Consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) An Independent Counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of Title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in

addition to that paid under subsection (b) of section 594 of Title 28 of the United States Code.

(c) For the purposes of carrying out the duties of the Office of Independent Counsel, an Independent Counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of Title 5 of the United States Code. This subsection shall not be construed to authorize the payment of any compensation in addition to that paid under subsection (c) of section 594 of Title 28 of the United States Code.

(d) An Independent Counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within the Independent Counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform the Independent Counsel's duties.

(e) An Independent Counsel may ask the Attorney General to refer matters related to the Independent Counsel's prosecutorial jurisdiction. An Independent Counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within the Independent Counsel's prosecutorial jurisdiction as established by this chapter. If such a referral is accepted, an Independent Counsel shall notify the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time.

(f) An Independent Counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) An Independent Counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

§ 600.2 Reporting and congressional oversight.

(a) An Independent Counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of the Independent Counsel. These statements and reports shall contain such information as the Independent Counsel deems appropriate.

(b) (1) In addition to any reports made under paragraph (a) of this section and before the termination of the Independent Counsel's office under this chapter, such Independent Counsel shall submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time, a report under this section.

(2) A report under this subsection shall set forth fully and completely a description of the work of the Independent Counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of the Independent Counsel which was not prosecuted.

(3) Unless prohibited by applicable law, an Independent Counsel may release to the Congress, the public, or

to any appropriate person, such portions of a report made under this subsection as he deems appropriate.

(c) An Independent Counsel shall advise the House of Representatives of any substantial and credible information which such Independent Counsel receives that may constitute grounds for an impeachment. Nothing in this chapter shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) Nothing in this chapter shall prevent the appropriate committees of the Congress from exercising oversight jurisdiction with respect to the official conduct of any Independent Counsel appointed under this chapter, and such Independent Counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

§ 600.3 Removal of an Independent Counsel; termination of office.

(a)(1) An Independent Counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the Independent Counsel's duties.

(2) If an Independent Counsel is removed from office, the Attorney General shall promptly submit to the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time, and to the Committees on the Judiciary of the Senate and the House of Representatives, a report specifying the facts found and the ultimate grounds for such removal. The Attorney General will not object to the making available of the report to the public by the Committees or the division of the Court.

(3) To the extent otherwise permitted by law, an Independent Counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the United States Court of Appeals for the District of Columbia referred to in section 49 of Title 28 of the United States Code, if such court exists at that time, or any court of competent jurisdiction and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief; provided that an Independent Counsel originally appointed by court order shall have such rights of review as provided by said order and by section 596(a)(3) of Title 28 of the United States Code.

(b) An office of Independent Counsel shall terminate when (1) the Independent Counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of the Independent Counsel or accepted by such Independent Counsel under § 600.1(e) of this chapter, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (2) the Independent Counsel files a report in full compliance with § 600.2(b) of this chapter.

§ 600.4 Relationship with components of the Department of Justice.

(a) Whenever a matter is in the prosecutorial jurisdiction of an Independent Counsel or has been accepted by an Independent Counsel under § 600.1(e) of this chapter, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by § 600.1(d) of this chapter, and except insofar as such Independent Counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an Independent Counsel participates in an official capacity or any appeal of such a case or proceeding.

§ 600.5 Savings provision, severability.

(a) Nothing in this chapter is intended to modify or impair any of the provisions of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code), or of any order issued thereunder.

(b) If any provision of the Ethics in Government Act relating to Independent Counsel (sections 591-598 of Title 28 of the United States Code) or any provision of this chapter is held invalid for any reason, such invalidity shall not affect any other provision of this chapter, it being intended that each provision of this chapter shall be severable from the Act and from each other provision.

3. A new Part 601 is added immediately after Part 600, to read as follows:

PART 601—JURISDICTION OF THE INDEPENDENT COUNSEL: IRAN/CONTRA

Authority: 28 U.S.C. 509, 510, and 515; 5 U.S.C. 301; Article II of the United States Constitution.

§ 601 Jurisdiction of the Independent Counsel: Iran/Contra.

(a) *The Independent Counsel:* Iran/Contra has jurisdiction to investigate to the maximum extent authorized by Part 600 of this chapter whether any person or group of persons currently described in section 591 of Title 28 of the United States Code, including Lieutenant Colonel Oliver L. North, other United States Government officials,

or other individuals or organizations acting in concert with Lt. Col. North, or with other United States Government officials, has committed a violation of any federal criminal law, as referred to in section 591 of Title 28 of the United States Code, relating in any way to:

(1) The direct or indirect sale, shipment, or transfer since in or about 1984 down to the present, of military arms, materiel, or funds to the Government of Iran, officials of that government, or persons, organizations or entities connected with or purporting to represent that government, or persons located in Iran;

(2) The direct or indirect sale, shipment, or transfer of military arms, materiel or funds to any government, entity, or persons acting, or purporting to act as an intermediary in any transaction above referred to in paragraph (a)(1) of this section;

(3) The financing or funding of any direct or indirect sale, shipment or transfer referred to in paragraph (a)(1) or (2) of this section;

(4) The diversion of the proceeds from any transaction described in paragraph (a)(1) or (2) of this section to or for any person, organization, foreign government or any faction or body of insurgents in any foreign country, including, but not limited to Nicaragua;

(5) The provision or coordination of support for persons or entities engaged as military insurgents in armed conflict with the Government of Nicaragua since 1984.

(b) *The Independent Counsel:* Iran/Contra shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal law by Oliver L. North, and any person or entity heretofore referred to, developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation, and to seek indictments and to prosecute any persons or entities involved in any

of the foregoing events or transactions who are reasonably believed to have committed a violation of any federal criminal law (other than a violation constituting a Class B or C misdemeanor, or an infraction, or a petty offense) arising out of such events, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any criminal offense.

(c) *The Independent Counsel:* Iran/Contra shall have prosecutorial jurisdiction to initiate and conduct prosecutions in any court of competent jurisdiction for any violation of section 1826 of Title 28 of the United States Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of the federal criminal laws, in connection with the investigation authorized by Part 600 of this chapter.

Dated: March 5, 1987.

Edwin Meese III,
Attorney General.

[FR Doc. 87-5064 Filed 3-9-87; 8:45 am]

DEPARTMENT OF JUSTICE

28 CFR Part 601

Correction

In rule document 87-5064 beginning on page 7270 in the issue of Tuesday, March 10, 1987, make the following corrections:

1. On page 7271, in the first column, in the chapter heading, "Chapter V" should read "Chapter VI".

§ 601.1 [Corrected]

2. On page 7272, in the third column, the section designation "§ 601" should read "§ 601.1".

BILLING CODE [Illegible]

APPENDIX H

Independent Counsel Provisions of the
Ethics in Government Act

28 U.S.C. §§ 591-98 (1982 & Supp. III)

§ 591. Applicability of provisions of this chapter

(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction.

(b) The persons referred to in subsection (a) of this section are—

(1) the President and Vice President;

(2) any individual serving in a position listed in section 5312 of title 5;

(3) any individual working in the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the in-

cumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office;

(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President.

(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.

§ 592. Application for appointment of a [1] independent counsel

(a) (1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney

General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

(A) the degree of specificity of the information received, and

(B) the credibility of the source of the information.

(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpenas.

(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint a [1] independent counsel.

(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(c)(1) If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of a [1] independent counsel. In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Attorney

General shall comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(2) If—

(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional information sufficient to constitute grounds to investigate about the matter to which such memorandum related, and

(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that reasonable grounds exist to warrant further investigation or prosecution,

then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of a [1] independent counsel.

(d) (1) Any application under this chapter shall contain sufficient information to assist the division of the court to select a [1] independent counsel and to define that independent counsel's prosecutorial jurisdiction.

(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

(e) The Attorney General may ask a [1] independent counse to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of a [1] independent counsel shall not be reviewable in any court.

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[1] So in original.

§ 593. Duties of the division of the court

(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

(b) Upon receipt of an application under section 592 (c) of this title, the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. A [1] independent counsel's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such prosecutor [2] shall be made public when any indictment is returned or any criminal information is filed.

(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing independent counsel, and such expansion may be in lieu of the appointment of an additional independent counsel.

(d) The division of the court may not appoint as a [1] independent counsel any person who holds or recently held any office of profit or trust under the United States.

(e) If a vacancy in office arises by reason of the resignation or death of a [1] independent counsel, the division of the court may appoint a [1] independent counsel to complete the work of the independent counsel whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of a [1] independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed. Upon the completion of such ju-

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[1] So in original.

dicial review, the division of the court shall take appropriate action.

(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reimbursement for all or part of the attorney's fees incurred by such subject during such investigation if—

(1) no indictment is brought against such subject; and

(2) the attorney's fees would not have been incurred but for the requirements of this chapter.

§ 594. Authority and duties of a [1] independent counsel

(a) Notwithstanding any other provision of law, a [1] independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal

[1] So in original.

matters, that such independent counsel deems necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpenas, or other court orders, and for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

(b) A [1] independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

(c) For the purposes of carrying out the duties of the office of independent counsel, a [1] independent counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

(d) A [1] independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(e) A [1] independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. A [1] independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

(f) A [1] independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

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[1] So in original.

(g) The independent counsel shall have full authority to dismiss matters within its prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

§ 595. Reporting and congressional oversight

(a) A[1] independent counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such independent counsel. These statements and reports shall contain such information as such independent counsel deems appropriate.

(b)(1) In addition to any reports made under subsection (a) of this section, and before the termination of a[1] independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report

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[1] So in original.

under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

(c) A[1] independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(e) A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of a [1] independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve,

[1] So in original.

and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

§ 596. Removal of a [1] independent counsel; termination of office

(a) (1) A[1] independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

(2) If a [1] independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

(3) A[1] independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

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[1] So in original.

(b)(1) An office of independent counsel shall terminate when (A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the independent counsel files a report in full compliance with section 595(b) of this title.

(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the report required by section 595(b) of this title.

§ 597. Relationship with Department of Justice

(a) Whenever a matter is in the prosecutorial jurisdiction of a[1] independent counsel or has been accepted by a[1] independent counsel under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

[1] So in original.

(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which a [1] independent counsel participates in an official capacity or any appeal of such a case or proceeding.

§ 598. Termination of effect of chapter

This chapter shall cease to have effect five years after the date of the enactment of the Ethics in Government Act Amendments of 1982, except that this chapter shall continue in effect with respect to then pending matters before a [1] independent counsel that in the judgment of such special counsel require such continuation until that independent counsel determines such matters have been completed.

[1] So in original.

APPENDIX I

[SEAL]

U.S. Department of Justice
Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

[Mar. 13, 1987]

The Honorable Lawrence E. Walsh
Independent Counsel
555 13th Street, N.W.
Suite 701
Washington, D.C. 20004

Dear Judge Walsh:

You have asked that we clarify the authority given an Independent Counsel appointed by the Attorney General under 28 C.F.R. 600.1(c) to "appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary." This provision in the regulations was intended to accomplish a delegation of the Attorney General's general authority, as head of the Department of Justice, to employ personnel, see 5 U.S.C. 3101, and of his particular authority to designate attorneys to conduct legal proceedings, including grand jury proceedings. See 28 U.S.C. 515(a). Attorneys appointed by an Independent Counsel pursuant to the delegation in 28 C.F.R. 600.1(c), and directed by the Independent Counsel to conduct particular legal proceedings, would be regarded as officers of the Department of Justice. See 28 U.S.C. 516 and Fed. R. Crim. Proc. 6(d), 54(c).

In order to effectuate the appointment of your staff, you should have each employee complete the standard "Affidavits of Appointment" form, (copy attached), and

be sworn-in in the presence of a person designated in 5 U.S.C. § 2903. If you will send a copy of the appointment affidavits to our personnel staff, together with dates of birth and social security numbers of designated staff members, they will execute "standard forms" 50 and 52 to memorialize the appointments. The Department's personnel office will retain the forms on file should it ever become necessary to pay your employees under the parallel appointments. The appointment affidavits should be sent to John C. Vail, Assistant Director, Personnel Staff, Justice Management Division, Room 6259, Department of Justice, Washington, D.C. 20530. Mr. Vail will return copies of the forms 50 and 52 when they are completed.

Sincerely,

/s/ Stephen S. Trott
STEPHEN S. TROTT
Associate Attorney General

Attachments

Supreme Court, U.S.
FILED
DEC 28 1987
JOSEPH F. SPANIOL, JR
CLERK

No. 87-869

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

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QUESTIONS PRESENTED

1. May petitioner defy a grand jury subpoena calling for unprivileged information on the ground that Independent Counsel—who was appointed by the Attorney General and may be removed from office by him—is not an "inferior Officer" who may be appointed by the Attorney General under Article II of the Constitution?

2. Having executed appointment forms pursuant to the Independent Counsel statute, were Associate Independent Counsel required to submit a second set of appointment forms in order to conduct the same investigation pursuant to the essentially identical terms of the Attorney General's regulation?

3. Does petitioner's unsupported assertion that the possibility of judicial review of a possible removal of Independent Counsel by the Attorney General generates a "here-and-now subservience" of Independent Counsel to the judiciary render the constitutionality of the Independent Counsel statute ripe for review?

4. Is petitioner's pre-indictment attack on the authority of Independent Counsel to conduct an ongoing grand jury investigation ripe for review?

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IN THE

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LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT LAWRENCE E. WALSH, INDEPENDENT COUNSEL

Lawrence E. Walsh, Independent Counsel, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit which upheld the Attorney General's appointment of Independent Counsel (Pet. App. A).[1] As described below, the power of the Attorney General to appoint Independent Counsel to conduct a criminal investigation

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[1] The Petition for Writ of Certiorari and the Appendices to the Petition are cited herein as "Pet." and "Pet. App.," respectively.

has been established since the time of Watergate, *see United States v. Nixon*, 418 U.S. 683, 692-97 (1974), and there is no need for further review of this issue by this Court.

STATEMENT OF THE CASE

A. The Attorney General's Application for Appointment of an Independent Counsel

On November 25, 1986, President Reagan announced that the preceding Friday, after becoming concerned as to whether the national security apparatus had provided him with a complete factual record respecting the implementation of his policy toward Iran, he had directed Attorney General Edwin Meese III to conduct a review of the matter over the weekend. 22 Weekly Comp. Pres. Doc. 1604 (1986). The President further stated that he had concluded that certain activities undertaken in this connection raised "serious questions of propriety," that "[d]etermination of the full details of this action will require further review and investigation by the Department of Justice," and that he anticipated receiving a report from the Attorney General at the earliest possible date. *Id.* The President also announced that petitioner Oliver L. North had been relieved of his duties on the National Security Council staff. *Id.*

On December 2, 1986, one week after the initial announcement of the Justice Department's investigation, Attorney General Meese announced that he had concluded that he should apply for the appointment of an Independent Counsel. The Attorney General stated that "[t]his step is being taken with the full encouragement and support of the President." He also suggested that a possible conflict of interest might result if the Department of Justice continued the investigation and that the national interest would be served by the appointment of an outside counsel:

> "I would note that the independent counsel statute allows for the appointment of a counsel, not just for 'covered persons' within the meaning of the statute, but for any other individuals who may be involved, where a possible conflict of interest might result if the Department of Justice continues the investigation, particularly where the national interest would thus be served by the appointment of an outside counsel to do so."

On December 4, 1986, the Attorney General filed an application for appointment of an Independent Counsel with the Division for the Purpose of Appointing Independent Counsels of the United States Court of Appeals for the District of Columbia Circuit (the "Special Division"). In his application to the Special Division, the Attorney General expressly stated that an Independent Counsel should be appointed pursuant to 28 U.S.C. § 591(c) (Pet. App. 88a), which provides for the appointment of an Independent Counsel "if the Attorney General determines that investigation . . . by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest."

B. The Court's Appointment of Independent Counsel

On December 19, 1986, the Special Division issued an order appointing Lawrence E. Walsh as Independent Counsel in the Iran/Contra matter. Order Appointing Independent Counsel, *In re Oliver L. North, et al.*, Div. No. 86-6, Dec. 19, 1986. As requested by the Attorney General, the Special Division authorized the Independent Counsel to investigate possible violations of federal criminal law by petitioner North, other United States Government officials, and individuals acting in concert with them. On December 19, 1986, Mr. Walsh accepted his appointment by signing an appointment affidavit and taking an oath of office.[2]

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[2] Mr. Walsh's appointment affidavit is Exhibit 2 to the Affidavit of Guy Miller Struve, Associate Independent Counsel, sworn to on

President Reagan issued a statement in which he welcomed the appointment of Independent Counsel Walsh, and called for the completion of the Independent Counsel's investigation at the earliest possible time. 22 Weekly Comp. Pres. Doc. 1658 (1986). The President stated that "Mr. Walsh has my promise of complete cooperation, and I have instructed all members of my administration to cooperate fully with the investigation in order to ensure full and prompt disclosure." *Id.*

C. The Attorney General's Parallel Appointment of Independent Counsel

On March 5, 1987, after petitioner had brought a civil action challenging the constitutionality of the Independent Counsel provisions of the Ethics in Government Act (as described below), Attorney General Meese issued a regulation, 28 C.F.R. Parts 600 and 601, which created an "Office of Independent Counsel: Iran/Contra" and provided that office with the same jurisdiction and powers that it already possessed under the Ethics in Government Act and the December 19, 1986 court order appointing Independent Counsel. 52 Fed. Reg. 7270 (March 10, 1987), 9241 (March 23, 1987) (Pet. App. 76a-86a).

The Attorney General stated that his purpose in issuing the regulation was "to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." 52 Fed. Reg. at 7271 (Pet. App. 76a-77a). He emphasized that the regulation was "not meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." 52 Fed. Reg. at 7270-71 (Pet. App. 76a). As the Department of Justice reaffirmed in its *amicus curiae* brief in the court below, under the Attorney General's regulation Inde-

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June 29, 1987 and filed with the district court in this case. The Struve Affidavit ("Struve Aff.") and its exhibits are a part of the record in the court of appeals.

pendent Counsel possesses the full authority conferred by his court appointment. *See* Brief on Behalf of Amicus Curiae United States at 6-7, *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987). The Attorney General's regulation confirmed in the same terms as the Independent Counsel statute and the court order the nature and scope of Independent Counsel's authority, his independence, the limitations on his removal, and the scope of his investigation.[3]

On the same day as he issued the Independent Counsel regulation, Attorney General Meese appointed Lawrence E. Walsh as Independent Counsel: Iran/Contra. Mr. Walsh accepted this appointment by signing an appointment affidavit which specified the "Department or agency" in which he was being appointed as "Office of the Independent Counsel: Iran/Contra" (*see* Struve Aff., par. 6 & Ex. 5).

D. North's Two Actions Seeking to Enjoin Independent Counsel's Investigation

On February 24, 1987, less than one month after the grand jury was empanelled, petitioner North brought an action for declaratory and injunctive relief. *North v. Walsh*, D.D.C., Civil Action No. 87-0457 (*"North I"*). He asserted that the Independent Counsel provisions of the Ethics in Government Act should be declared unconstitutional and sought to halt the investigation.

On March 6, 1987, the day after the Attorney General's parallel appointment of Independent Counsel, petitioner filed a second complaint. *North v. Meese*, D.D.C., Civil Action No. 87-0626 (*"North II"*). He now contended that the Attorney General's appointment of Mr.

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[3] *Compare* 28 C.F.R. § 600.1 (Authority and duties of an Independent Counsel) (Pet. App. 78a-81a) *with* 28 U.S.C. § 594 (Pet. App. 92a-95a) (same), *and compare* 28 C.F.R. § 601.1 (Jurisdiction of the Independent Counsel: Iran/Contra) (Pet. App. 84a-86a) *with* December 19, 1986 Order, pp. 1-3 (same).

Walsh as Independent Counsel under the regulation violated the Constitution and laws of the United States. In *North I*, petitioner objected to the Court appointment and statutory authorization of an Independent Counsel, but claimed that Executive appointment of an Independent Counsel would be appropriate. In *North II*, petitioner objected to the Executive appointment of an Independent Counsel.

On March 12, 1987, the district court dismissed both of petitioner's complaints, concluding that North's pre-indictment challenges were premature and that he, "like any other potential criminal defendant, can raise his objections by appropriate motions, *if* and *when* an indictment is entered." *North v. Walsh*, 656 F. Supp. 414, 423 (D.D.C. 1987) (emphasis in original). On October 1, 1987, the court of appeals summarily affirmed that decision, holding that petitioner "has impermissibly attempted to attack collaterally a pending criminal investigation through the maintenance of a separate civil action . . . [P]otential criminal defendants cannot, by bringing ancillary equitable proceedings, circumvent federal criminal procedure." *North v. Walsh*, No. 87-5058 (D.C. Cir. Oct. 1, 1987) (*per curiam*) (quotation omitted).

E. North's Present Attack Upon the Authority of Independent Counsel

On April 7, 1987, petitioner North was served with a grand jury subpoena calling for certain unprivileged information described more fully in sealed portions of the record in the courts below.[4] North refused to produce the requested information and was held in civil contempt.

[4] The facts and law relating to the unprivileged information sought by the grand jury are discussed at pages 8-10 and 13-15 of Respondent's Brief for Appellee on Ripeness Issues filed under seal in the court of appeals. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). A copy of this brief has been lodged with the Clerk of this Court under seal for the Court's information.

On June 8, 1987, the court of appeals held that North's challenge to the authority of Independent Counsel was ripe for judicial review in this context and remanded the proceeding to the district court to determine the merits of the challenge. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987) (Pet. App. 66a-73a). The court directed the district court to resolve the matter, if possible, without reaching the question of the constitutionality of the Ethics in Government Act (Pet. App. 74a-75a).

On July 10, 1987, Chief Judge Aubrey E. Robinson, Jr. of the United States District Court for the District of Columbia upheld the authority of Independent Counsel under the Attorney General's regulation, and found it unnecessary to reach the constitutionality of the statute. *In re Sealed Case*, Misc. No. 87-0139 (D.D.C. July 10, 1987) (Pet. App. 42a-51a).

On August 20, 1987, a panel of the court of appeals affirmed the order of the district court in an opinion by Circuit Judge D. H. Ginsburg. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987) (Pet. App. 1a-40a). All three judges agreed that Independent Counsel and his subordinates have legal authority to pursue the investigation in the Iran/Contra matter under the Attorney General's regulation (Pet. App. 10a-23a, 28a). The majority held further that nothing in the relationship between Independent Counsel and the Special Division of the court of appeals called for review of the constitutionality of the Independent Counsel provisions of the Ethics in Government Act (Pet. App. 23a-29a). Judge Williams dissented in part, on the ground that North's constitutional challenge to the Independent Counsel statute was ripe for determination (Pet. App. 32a-40a).

On October 23, 1987, the court of appeals, *en banc*, denied petitioner's suggestion for rehearing *en banc*, noting that no member of the court had requested the taking of a vote thereon (Pet. App. 64a).

REASONS FOR DENYING THE WRIT

As the court of appeals unanimously and correctly held, the Attorney General had the legal authority to issue his Independent Counsel regulation pursuant to 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515. The statutory authority of the Attorney General to appoint a special prosecutor was squarely upheld by this Court in *United States v. Nixon*, 418 U.S. 683, 692-97 (1974), and the functions delegated to Independent Counsel Walsh by regulation are virtually identical to those delegated to the Watergate Special Prosecutor by regulation. Furthermore, contrary to petitioner's contention, Independent Counsel is not a "superior officer" who must be appointed by the President with the advice and consent of the Senate under the Appointments Clause (Article II, Section 2, Clause 2) of the United States Constitution, and the Attorney General may validly limit by regulation his own power to remove the Independent Counsel.

Appropriate authority has been properly vested in Independent Counsel and his Associate Counsel pursuant to the Attorney General's regulation. The appointment forms and oaths executed pursuant to the Independent Counsel statute are sufficient as appointments and oaths pursuant to the identical terms of the Independent Counsel regulation. Consistent with 28 U.S.C. § 515, the Attorney General by his regulation has given "specific direct[ion]" that Independent Counsel and his staff continue their investigation. None of the cases interpreting 28 U.S.C. § 515 requires a particular form of direction.

The court of appeals also properly declined to address the constitutionality of the Independent Counsel provisions of the Ethics in Government Act, since the Attorney General's parallel appointment furnishes an independent and sufficient basis for the authority of Independent Counsel in this case. The mere claim of a separation of powers violation does not make the constitu-

tionality of the statute ripe for review. North has suffered no legal injury sufficient to require this Court to reach out to decide the constitutionality of an act of Congress.

Finally, the court of appeals, in a threshold ruling in this case, held that petitioner, the recipient of a valid grand jury subpoena calling for unprivileged information, could properly challenge the authority of the prosecutor conducting the grand jury investigation prior to indictment. This ruling squarely conflicts with this Court's longstanding reluctance to interfere with ongoing grand jury investigations.

I. THE ATTORNEY GENERAL HAD LEGAL AUTHORITY, CONSISTENT WITH ARTICLE II OF THE CONSTITUTION, TO DELEGATE THE POWERS CONVEYED TO INDEPENDENT COUNSEL BY THE ATTORNEY GENERAL'S REGULATION

In issuing his regulation, the Attorney General expressly relied upon his statutory authority under 5 U.S.C. § 301 and 28 U.S.C. §§ 509, 510, and 515, and upon "the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution . . . ." 52 Fed. Reg. 7270, 7271 (March 10, 1987) (Pet. App. 77a). The court of appeals had "no difficulty concluding that the Attorney General possessed the statutory authority to create the Office of Independent Counsel: Iran/Contra and to convey to it the 'investigative and prosecutorial functions and powers' described in 28 C.F.R. § 600.1(a) of the regulation." (Pet. App. 11a.) The court's ruling was fully consistent with prior decisions of this Court.

A. The Attorney General's Regulation Is Substantially Identical to the Watergate Special Prosecutor Regulation Upheld by This Court in *United States v. Nixon*

The statutory authority of the Attorney General to appoint Independent Counsel is established by the deci-

sion of this Court in *United States v. Nixon*, 418 U.S. 683, 692-97 (1974). In *Nixon*, this Court upheld the Attorney General's appointment of the Watergate Special Prosecutor pursuant to 5 U.S.C. § 301 and 28 U.S.C. §§ 509 and 510, among the same statutory provisions relied upon by the Attorney General here. Under the Attorney General's regulation involved in *Nixon*, the Watergate Special Prosecutor was given "full authority for investigating and prosecuting offenses against the United States arising out of the unauthorized entry into Democratic National Committee headquarters at the Watergate, all offenses arising out of the 1972 Presidential election for which the Special Prosecutor deems it necessary and appropriate to assume responsibility, allegations involving the President, members of the White House staff, or Presidential appointees, and any other matters which he consents to have assigned to him by the Attorney General." 38 Fed. Reg. 30738-39 (Nov. 7, 1973), *as amended by* 38 Fed. Reg. 32805 (Nov. 28, 1973).

More particularly, the Watergate Special Prosecutor was given "full authority" with respect to eight specific functions, all of which are substantially the same as those which petitioner challenges as impermissible activities of the Independent Counsel here: [5]

> (1) "Conducting proceedings before grand juries and any other investigations he deems necessary," 38 Fed. Reg. at 30739 (compare 28 C.F.R. § 600.1 (a) (4) (Pet. App. 78a));
>
> (2) "Reviewing all documentary evidence available from any source, as to which he shall have full

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[5] The only powers enumerated in the Independent Counsel regulation which were not expressly set forth in the Watergate Special Prosecutor regulation are the power to receive national security clearances and to contest national security assertions (28 C.F.R. § 600.1(a)(6) (Pet. App. 79a)) and the power to obtain tax returns (28 C.F.R. § 600.1(a)(8) (Pet. App. 79a)). Both of these powers, however, were in fact possessed and exercised by the Watergate Special Prosecutor. *See, e.g., Watergate Special Prosecution Force Rep.* 24, 63-65, 70-71, 202-03 (1975).

access," *id.* (compare 28 C.F.R. § 600.1(a)(4) (Pet. App. 78a));

(3) "Determining whether or not to contest the assertion of 'Executive privilege' or any other testimonial privilege," *id.* (compare 28 C.F.R. § 600.1(a)(5) (Pet. App. 79a));

(4) "Determining whether or not application should be made to any Federal court for a grant of immunity to any witnesses, consistently with applicable statutory requirements, or for warrants, subpoenas, or other court orders," *id.* (compare 28 C.F.R. § 600.1(a)(7) (Pet. App. 79a));

(5) "Deciding whether or not to prosecute any individual, firm, corporation, or group of individuals," *id.*;

(6) "Initiating and conducting prosecutions, framing indictments, filing informations, and handling all aspects of any cases within his jurisdiction (whether initiated before or after his assumption of duties), including any appeals," *id.* (compare 28 C.F.R. § 600.1(a)(2), (3), (9) (Pet. App. 78a, 79a));

(7) "Coordinating and directing the activities of all Department of Justice personnel, including U.S. Attorneys," *id.*; and

(8) "Dealing with and appearing before congressional committees having jurisdiction over any aspect of the above matters and determining what documents, information, and assistance shall be provided to such committees." *Id.*

In *Nixon*, Special Prosecutor Leon Jaworski sought the production of certain tapes and documents from President Nixon, who resisted production on the ground of executive privilege. The President argued that the case was nonjusticiable because it was simply "an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to

judicial resolution." 418 U.S. at 692. In rejecting this argument, this Court, citing the very same statutes relied upon by the Attorney General in issuing the regulation at issue here, specifically upheld the power of the Attorney General to confer "unique authority and tenure" upon the Watergate Special Prosecutor:

> "Under the authority of Art. II, § 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. 28 U.S.C. § 516. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. 28 U.S.C. §§ 509, 510, 515, 533. Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties. 38 Fed. Reg. 30739, as amended by 38 Fed. Reg. 32805." 418 U.S. at 694-95 (footnotes omitted).

The decision in *United States v. Nixon* establishes beyond question the authority of the Attorney General to issue the regulation at issue here and to appoint Independent Counsel Walsh.[6] As in *Nixon*, the Attorney General properly and legitimately delegated full power and independent authority to an independent prosecutor to exercise investigative and prosecutorial functions with respect to a limited series of events and occurrences; as

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[6] Petitioner asserts that *United States v. Nixon* addressed only the issue of justiciability and did not address the authority of the Attorney General to delegate his law enforcement powers to the Special Prosecutor (Pet. 15 n.10). In fact, however, this Court held in *Nixon* that the controversy before it was justiciable precisely *because* the Attorney General had the authority to delegate such powers to the Special Prosecutor. *See* 418 U.S. at 692-97.

in *Nixon*, Independent Counsel's role is temporary, episodic and explicitly limited by the scope of his jurisdiction as defined by the Attorney General.

B. An Independent Counsel Appointed and Removable by The Attorney General Is Not a "Superior Officer" Under Article II of the Constitution

Petitioner also argues that Independent Counsel Walsh is a "superior officer" who must be appointed by the President with the advice and consent of the Senate under the Appointments Clause (Article II, Section 2, Clause 2) of the United States Constitution (Pet. 9-17). In actuality, Independent Counsel is an "inferior Officer," whose appointment Congress may vest, under the express terms of the Appointments Clause (Pet. 2), "in the President alone, in the Courts of Law, or in the Heads of Departments." As the head of a Department himself appointed by the President and confirmed by the Senate, the Attorney General had authority to appoint Independent Counsel.

As the court of appeals held (Pet. App. 13a-14a), Independent Counsel under the Attorney General's regulation is clearly an "inferior Officer" because the Attorney General has the power to rescind the regulation.[7] Thus this case does not require this Court to issue any "clarification of the proper distinction between 'inferior Officers' and 'superior' Officers" (Pet. 16).

Petitioner's argument that Independent Counsel is not an "inferior Officer" is based in large part on a miscon-

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[7] Petitioner concedes that this holding would be correct if the Attorney General could rescind the regulation "at will" (*see* Pet. 12-13), but argues that the result would be different if such a rescission were subject to any measure of judicial review (Pet. 11-12). In other words, petitioner would have this Court grant certiorari to issue an advisory opinion on the scope of judicial review of a hypothetical revocation of the regulation by the Attorney General—hardly an appropriate case for the exercise of this Court's certiorari jurisdiction.

ception of this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*see* Pet. 10-11, 16). In *Buckley*, the Court held that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by" the Appointments Clause. 424 U.S. at 126. This "significant authority" test, however, was not intended to differentiate those principal officers who must be appointed by the President with the advice and consent of the Senate from the "inferior Officers" who may, under the Appointments Clause, be appointed by the President, by heads of departments, or by the courts. Rather, the Court very clearly stated that the "significant authority" test of *Buckley* was meant only to differentiate between mere employees of the Government and those "officers"—whether principal officers or "inferior Officers"—who were to be named pursuant to either of the provisions of the Appointments Clause. *See* 424 U.S. at 126.[8]

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[8] This is underscored by the fact that the Court in *Buckley* quoted with approval the traditional standard for identifying inferior as opposed to principal officers, under which "inferior Officers" are "officers inferior to those specially mentioned" in the Appointments Clause. *United States v. Germaine*, 99 U.S. 508, 509-10 (1879), *quoted in Buckley*, 424 U.S. at 125. Under this standard, the Independent Counsel is clearly an "inferior Officer," because he is not an officer specially mentioned in the Appointments Clause of the Constitution.

A practical assessment of the Independent Counsel's authority likewise leads to the conclusion that he is an "inferior Officer." The Independent Counsel's role is temporary, episodic, and explicitly limited by his mandate. Both the tenure of the office and the scope of responsibilities are far more limited, for example, than a United States Attorney's continuing obligation to prosecute and defend all civil and criminal actions on behalf of and against the United States in the appropriate district, and the temporary appointment of United States Attorneys by the courts has been upheld under the "inferior Officers" clause. *See United States v. Solomon*, 216 F. Supp. 835 (S.D.N.Y. 1963).

Petitioner suggests that Independent Counsel cannot be an "inferior Officer" because there is no "superior officer" who can direct Independent Counsel in the fulfillment of his duties or who can remove Independent Counsel at will. While he concedes that "[t]he Executive might in some respects be limited in his ability to remove inferior Officers," petitioner argues that the Executive cannot be both limited in his ability to remove and at the same time deprived of substantive control over decisionmaking (Pet. 13).[9] This argument is simply inconsistent with the plain meaning of the Appointments Clause, which does not require that all "inferior Officers" be subject to or removable at will by a "superior officer" (a term which, as the court of appeals noted (Pet. App. 13a n.32), does not appear in the Constitution). Indeed, the word "inferior" does not necessarily mean "subordinate to a superior" at all; it may (and more often does) mean "lower in place or importance" without meaning "subordinate."[10] Petitioner's argument is likewise inconsistent with the decisions of this Court, which have not held that an "inferior Officer" must be subordinate to the directives of a "superior officer," or must be removable at will.[11]

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[9] Petitioner necessarily must concede that requiring cause for removal, as the Attorney General's regulation does, is constitutional under this Court's decisions in *Wiener v. United States*, 357 U.S. 349, 353 (1958), *Humphrey's Executor v. United States*, 295 U.S. 602, 626-32 (1935), and *United States v. Perkins*, 116 U.S. 483, 485 (1886).

[10] The 1785 edition of Dr. Johnson's dictionary demonstrates that "subordinate" was not the primary meaning of "inferior" at the time the Constitution was drafted; in order of preference, the definitions of "inferior" given therein were, first, lower in place; second, lower in station or rank of life; third, lower in value or excellency; and last, subordinate. S. Johnson, *A Dictionary of the English Language in Which the Words Are Deduced from Their Originals* (1785). *See also* 5 *Oxford English Dictionary* 49 (1933).

[11] The election supervisors whose judicial appointment was upheld by this Court in *Ex parte Siebold*, 100 U.S. 371, 397-98 (1880),

Petitioner's Appointments Clause argument represents an attempt to overturn the holding of *United States v. Nixon*, 418 U.S. at 692-97, that the Attorney General may appoint Independent Counsel to conduct a criminal investigation. Petitioner's novel view of the Appointments Clause is unsupported by any decision of this Court, and does not justify reexamination of *United States v. Nixon*.

II. INDEPENDENT COUNSEL AND ASSOCIATE COUNSEL WERE PROPERLY APPOINTED IN COMPLIANCE WITH 28 U.S.C. § 515

Petitioner next argues that appropriate authority has not been vested in Independent Counsel's Associate Counsel and that the court of appeals misapplied 28 U.S.C. § 515 in concluding that it was (Pet. 17-23). While petitioner does not suggest that Independent Counsel Walsh was not properly vested with authority by the Attorney General under section 515, he argues that Associate Counsel in the Office of Independent Counsel are without authority because they have not executed separate appointment affidavits under the regulation as distinct from the ones they executed under the identical provisions of the statute (Pet. 18-21). Not surprisingly, this argument was unanimously rejected by the court of appeals.

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were not subordinate to or removable by any "superior officer," although they had certain reporting obligations to the chief supervisor of elections in each judicial district. *See* 16 Stat. 433-38 (1870). In *United States v. Eaton*, 169 U.S. 331 (1898), the Court held that a Vice Consul remains an "inferior Officer" even when he takes the place of the Consul, who is not an "inferior Officer": "Because the subordinate officer is charged with the performance of the duty of the superior for a limited time, and under special and temporary conditions, he is not thereby transformed into the superior and permanent official." 169 U.S. at 343. The same is true here, when the Attorney General has chosen to delegate his full authority for a limited period of time for a particular investigation under special and temporary conditions.

The basic fallacy in petitioner's argument is his assumption that the Independent Counsel regulation issued by the Attorney General was intended to create a new and different Office of Independent Counsel, separate and distinct from the Office that already was in existence under the statute. The true purpose of the Attorney General's regulation was exactly the opposite: it was to guarantee the continuation of the existing Office of Independent Counsel by giving it a concurrent and parallel source of authority identical in all respects to the authority which it possessed under the statute. *See* 52 Fed. Reg. 7270-71 (March 10, 1987) (Pet. App. 76a-77a). Since the powers of Independent Counsel and Associate Counsel under the regulation are identical to those under the statute, there simply was no need, as the court of appeals concluded, for Associate Counsel to execute duplicate appointment affidavits under the regulation.

The court of appeals recognized this self-evident fact, stating "we find that appointment to the one office carries over to the other" (Pet. App. 16a). The court continued:

> "The offices established under the Ethics Act and under the regulation have identical investigative and prosecutorial powers and jurisdiction. In addition, Walsh serves as Independent Counsel for each office, with the parallel authority to appoint associate counsel. Finally, the terms of the appointment and oath forms for the two offices are virtually identical. In sum, by previously submitting the appointment and oath forms to the Special Division, the associate counsel accepted appointments and took oaths identical to those that would have been required under the regulation, in order to perform the same jobs in a functionally indistinguishable office to that established by the regulation. Undoubtedly for these reasons, the Department of Justice accepts that the appointments and oaths made pursuant to the Ethics

> Act are sufficient as appointments and oaths of associate counsel within the Office of Independent Counsel: Iran/Contra. We agree with the district court that '[n]ew appointment documents, therefore, would have served no purpose, as associate counsel had already made the necessary representations and were bound to their responsibilities under the first set of forms.'" (Pet. App. 16a-17a (citation omitted)).[12]

Petitioner also contends that the Attorney General failed to comply with the requirement of 28 U.S.C. § 515(a) that he "specifically direct[]" Independent Counsel and Associate Counsel to conduct a grand jury investigation (Pet. 21-23). In so arguing, North relies upon the lack of any "letter of authority" from the Attorney General (or his delegate) to each attorney.

28 U.S.C. § 515(a) permits any attorney "specially appointed" by the Attorney General, when "specifically

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[12] On March 13, 1987, Associate Attorney General Trott wrote to Mr. Walsh, stating that Mr. Walsh's staff should complete appointment affidavits and be sworn in, and that the affidavits should be sent to the Justice Department (Pet. App. 100a-101a). At the time, however, the Department of Justice was not aware that each of the Associate Counsel in the Office of Independent Counsel already had executed appointment affidavits pursuant to their initial appointments by Independent Counsel (*see* Struve Aff., par. 4 & Ex. 3). Since the Independent Counsel's power to appoint Associate Counsel is precisely the same under the Attorney General's regulation as it is under the statute, *compare* 28 C.F.R. § 600.1(c) (Pet. App. 80a) *with* 28 U.S.C. § 594(c) (Pet. App. 94a), Independent Counsel concluded that there was no need for Associate Counsel to execute duplicate appointment affidavits pursuant to the Attorney General's regulation, and the Department of Justice was so informed (Struve Aff., par. 7). The Justice Department likewise advised the court of appeals that it "fail[ed] to see any compelling reason that the associate counsel should be required to execute duplicate affidavits under the regulations" once Mr. Walsh had executed a separate affidavit. Brief on Behalf of Amicus Curiae United States at 20, *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987).

directed" by the Attorney General, to conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings. There is no question that Mr. Walsh was specially appointed by the Attorney General and accepted the appointment under the specific jurisdictional limitations set forth in the Attorney General's regulation. Thereafter, under the regulation's provision authorizing him to hire Associate Counsel, fix their compensation and assign their duties, 28 C.F.R. § 600.1(c) (Pet. App. 80a), and present matters within his jurisdiction to the grand jury, 28 C.F.R. § 600.1(a) (Pet. App. 78a-79a), Mr. Walsh directed his subordinates, already hired by him as employees of the Office of Independent Counsel created by the Special Division and who had all signed appointment affidavits, to proceed with the investigation in which they already were engaged. As the court of appeals concluded (Pet. App. 15a-19a), no more was required.

The Attorney General's regulation and his appointment of Mr. Walsh accomplished both purposes of section 515 —special appointment and specific direction. Indeed, the regulation is a more detailed and more formal delegation of authority, which more clearly defines and circumscribes Mr. Walsh's jurisdiction, than any Attorney General letter at issue in any of the reported cases. *See, e.g., United States v. Prueitt*, 540 F.2d 995, 1000 (9th Cir. 1976), *cert. denied*, 429 U.S. 1063 (1977). As the court of appeals noted: "Although the cases concerning compliance with Section 515(a) almost uniformly involve a dispute over whether a particular 'letter of authority' specifically authorized the investigation being conducted, no court has held that section 515(a) requires that there be any 'letter of authority' as such . . . . From the facts of this case, we conclude that a specific direction has been given, and that the purpose of the statute has been met." (Pet. App. 17a-18a).

It would be difficult to imagine the Attorney General giving any more "specific direct[ion]" to the Independent Counsel and his staff than he did in the regulation. To demand the "duplicative effort" of requiring the associate counsel to submit second appointment forms and take oaths for a second time would be, in the words of the court of appeals, to "exalt forms over substance" (Pet. App. 19a).

III. THE DECISION OF THE COURT BELOW NOT TO REACH PETITIONER'S CHALLENGE TO THE CONSTITUTIONALITY OF THE INDEPENDENT COUNSEL STATUTE IS FULLY CONSISTENT WITH THIS COURT'S DECISION IN *BOWSHER* v. *SYNAR*

Petitioner argues that even after upholding the authority of Independent Counsel under the Attorney General's regulation, the court of appeals nevertheless should have gone on to pass on the constitutionality of the Independent Counsel statute because, petitioner asserts, the possibility of judicial review under the statute of a possible removal of Independent Counsel by the Attorney General creates a "here-and-now subservience," *Bowsher v. Synar*, 106 S. Ct. 3181, 3189 n.5 (1986), of Independent Counsel to the Special Division (Pet. 23-27). As the court of appeals correctly held (Pet. App. 20a-25a), this argument is far too attenuated to render the constitutionality of the statute ripe for review.

The possibility of judicial review of a possible removal of Independent Counsel by the Attorney General does not create a "here-and-now subservience" of Independent Counsel to the court which might conduct such review.[13] If the possibility of removal by the Attorney General cre-

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[13] Thus, for example, no one would contend that the decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), created a "here-and-now subservience" of Commissioners of the Federal Trade Commission to the courts.

ated a "here-and-now subservience" to anyone, it would be to the Attorney General himself, not to any court.[14] It is, after all, the Attorney General who may remove Independent Counsel, not the court whose role is limited to determining whether the removal was for good cause or was arbitrary or capricious. When this Court used the term "here-and-now subservience" in *Bowsher v. Synar*, it was referring to the power of Congress to remove the Comptroller General, not the possibility of judicial review of an exercise of that power.[15]

The mere possibility of judicial review of an executive action pursuant to a statute or regulation has never been held to mean that the constitutionality of the statute or regulation is ripe for judicial review. To hold otherwise would mean, as the court of appeals suggested, that "the constitutionality of a statute is ripe for review any time a party raises a separation of powers claim" (Pet. App. 23a-24a n.57).[16]

As the court of appeals recognized (Pet. App. 75a), "the judiciary should rule on the constitutionality of an Act of Congress only as a last resort . . . ." *See, e.g., United States v. Locke*, 471 U.S. 84, 92 (1985); *Ashwander v. TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis,

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[14] Of course, any actual subservience of Independent Counsel to the Attorney General is precluded by the safeguards of independence built into both the statute and the regulation.

[15] The words of *Bowsher* make this point clearly. The Court held that it "is the Comptroller General's *presumed desire to avoid removal by pleasing Congress*, which creates the here-and-now subservience to another branch that raises separation of powers problems." *Bowsher v. Synar*, 106 S. Ct. at 3189 n.5 (internal quotation marks and citation omitted; emphasis added).

[16] Moreover, as the court of appeals noted, petitioner "does not identify any way in which this 'here-and-now' effect is even arguably felt by him" (Pet. App. 24a-25a). North does not claim that the statute has prompted Independent Counsel to take actions that he would not have taken but for the existence of the statute.

J., concurring). Since Independent Counsel's powers under the Attorney General's appointment are identical to those under the Independent Counsel statute, there is no need for this Court to reach out to decide the constitutionality of the statute, and every reason for this Court to avoid unnecessary constitutional adjudication.

IV. PETITIONER'S ATTACK UPON AN ONGOING GRAND JURY INVESTIGATION IS NOT RIPE FOR REVIEW

In a threshold ruling in this case, the court of appeals held that a pre-indictment challenge to the authority of Independent Counsel was ripe for review when raised by a witness resisting an otherwise valid grand jury subpoena for unprivileged information (Pet. App. 66a-73a). The court concluded that Independent Counsel's asserted lack of authority provides "just cause" for refusal to comply with the subpoena under 28 U.S.C. § 1826. The court suggested that the enactment of section 1826 overruled *Blair v. United States*, 250 U.S. 273 (1919), and held that its conclusion was compelled by *United States v. Ryan*, 402 U.S. 530 (1971). The court of appeals, we submit, was wrong in so holding.

To effectuate the strong public interest in an expeditious and thorough criminal investigation, this Court and the lower courts have repeatedly refused to permit collateral attacks upon ongoing criminal investigations at the pre-indictment stage. As the Court said in *Blair v. United States*, 250 U.S. at 282, an individual "is not entitled to challenge the authority of . . . the grand jury, provided they have a *de facto* existence and organization." *See also United States v. Calandra*, 414 U.S. 338, 349 (1974) ("Permitting witnesses to invoke the exclusionary rule before a grand jury would precipitate adjudication of issues hitherto reserved for the trial on the merits and would delay and disrupt grand jury proceedings."); *United States v. Dionisio*, 410 U.S. 1, 17

(1973) (impeding a grand jury's investigation "frustrate[s] the public's interest in the fair and expeditious administration of the criminal laws"). Rather than permit disruption of ongoing criminal investigations, any challenge to the authority or propriety of a criminal investigation should be heard only *after* an indictment (if any) is returned by the grand jury. Until such time, petitioner has suffered no cognizable injury and his claim is not ripe for review.

The real issue before the court of appeals was whether petitioner should be required to furnish unprivileged information to the grand jury. It is for refusing to do this that petitioner was adjudged in civil contempt. In the absence of any colorable basis for withholding the information sought, petitioner does not face a legitimate dilemma of foregoing a right or privilege or facing incarceration. Rather, by making the decision not to comply with a valid subpoena, petitioner attempted to establish a basis for ripeness that is wholly artificial.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 87-869

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v.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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LAWRENCE E. WALSH, INDEPENDENT COUNSEL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

The main thrust of Respondent's Brief in Opposition is that the Petition for a Writ of Certiorari should be denied because in respondent's view petitioner is wrong on the merits. However, respondent cannot seriously take issue either with petitioner's claim that the questions presented are of exceptional importance or with his assertion that the law at issue is hotly debated and plainly unsettled. Whatever its proper disposition on the merits, respondent's analysis is neither uniformly accepted nor clearly correct, and it offers no sound basis for denying this petition for certiorari.

Indeed, the Brief for the United States as Amicus Curiae confirms the need for review of the ruling below by curiously adopting the legal analysis advanced by the separate concurring and dissenting opinion of Judge Williams—with which petitioner in large part agrees—as a basis for denying certiorari.

1. Respondent argues that the petition should be denied because the court of appeals erred in reaching the merits of any of petitioner's arguments. Opp. to Pet. for Cert. at 22. This "ripeness" argument is meritless. The unanimous ruling of the court of appeals that the recipient of a grand jury subpoena who is held in contempt for failure to comply may defend against compliance on the ground that its issuance was without lawful authority, *see* App. 66a-73a, is entirely consistent with the decisions of numerous other courts of appeals, and respondent has not cited a single ruling to the contrary. *See, e.g., In re Perlin*, 589 F.2d 260 (7th Cir. 1978); *In re Subpoena of Persico*, 522 F.2d 41 (2d Cir. 1975); *DiGirlomo* v. *United States*, 520 F.2d 372 (8th Cir.), *cert. denied*, 423 U.S. 1033 (1975). The D.C. Circuit's decision also is consistent with repeated decisions of this Court recognizing a litigant's right to challenge the lawfulness of exercises of governmental power that are "regulatory, proscriptive, or compulsory in nature." *See Laird* v. *Tatum*, 408 U.S. 1, 11 (1972). The independent counsel's argument—not even advanced by the Solicitor General—exhibits an acute disregard for the right of a citizen to challenge the exercise of coercive governmental power and is unprecedented.[1]

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[1] Respondent's argument that the court of appeals "suggested that the enactment of section 1826 overruled *Blair* v. *United States*, 250 U.S. 273 (1919) . . ." (Opp. to Pet. for Cert. at 22) is entirely untrue. The decision of the court of appeals required no holding that § 1826 overruled *Blair*, and that court certainly made no such suggestion. In fact, the court expressly noted that *Blair* defined one category of impermissible challenges by recipients of subpoenas, but that petitioner presented a wholly different kind of challenge that was not controlled by *Blair*. *See* App. 72a.

In any event, if the court of appeals erred in reaching the merits of the case, the proper course is not to deny certiorari—and thereby to let stand, unreviewed, that court's ruling on issues of exceptional importance—but instead to grant the petition and vacate the ruling below.

Alternatively, the "ripeness" argument advanced by respondent is substantially analogous to one of the issues before this Court in *United States Catholic Conference and National Conference of Cath-*

2. Respondent offers two answers to petitioner's argument that certiorari should be granted to consider the lawfulness of the Attorney General's regulation. First, he argues that this Court already resolved the lawfulness of the Attorney General's regulation in *United States* v. *Nixon*, 418 U.S. 683 (1974). Second, he asserts that under the proper reading of the Appointments Clause of Article II, petitioner is incorrect in arguing that the regulation is unlawful. Both of these responses are wrong, and they serve only to underline the importance of the issues raised in the petition (which respondent nowhere disputes) and the pervasive confusion in this area of the law.

A. A fair reading of *United States* v. *Nixon*, *supra*, establishes that the lawfulness of the regulation appointing the special prosecutor and delegating powers to him was not at issue there. The pages in *Nixon* on which respondent relies, 418 U.S. at 692-97 (*see* Opp. to Cert. Pet. at 12 n.6), straightforwardly analyze the justiciability of the issue presented. The parties in that case took as a given the fact that the "President has delegated certain specific powers to the Special Prosecutor," *id.* at 693, and not surprisingly neither the President nor the Special Prosecutor challenged the President's authority to do so. It would have been peculiar indeed for the President to have defended against a subpoena in that case on the ground that he had acted unlawfully in delegating away his own authority. The assertion that the *Nixon* Court held the controversy to be justiciable "precisely *because* the Attorney General had the authority to delegate such powers" (Opp. to Pet. for Cert. at 12 n.6) is misleading and unsupported by the Court's opinion.

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olic Bishops v. *Abortion Rights Mobilization, Inc., et al.*, No. 87-416. That case raises the issue whether a subpoenaed party in a civil case may challenge the power of the issuing authority to act. Rather than be denied or vacated on the alternate ground offered by respondent—that the questions presented are not properly before this Court at this time—at a minimum this petition should be held for a decision in No. 87-416.

The issue presented in this petition was neither presented to nor resolved by this Court in *United States* v. *Nixon*.

Moreover, the Watergate regulation differed from the Attorney General's regulation here in crucial ways that demonstrate a keen sensitivity in an earlier era to the very issues raised by petitioner. For one, the President, not the Attorney General, delegated the powers at issue in *Nixon*, and the question of the *Attorney General's* authority therefore was not presented. Second, the regulation by its terms expressly recognized that the President has "constitutional powers to effect the discharge of the Special Prosecutor or to limit [his] independence," but noted that the President had assured the Attorney General that he "will not exercise" those powers. *See* 418 U.S. at 694 n.8, quoting 38 Fed. Reg. 30739. The Watergate regulation therefore presented the removal issue in an entirely different posture from the Attorney General's regulation, which recognizes no such inherent right of the Executive to remove the independent counsel or amend his office.

Finally, whereas respondent is not accountable to anyone under the Attorney General's regulation, the Watergate regulation pointedly limited the delegation of authority to the Special Prosecutor by giving him "the greatest degree of independence that is consistent with the Attorney General's statutory accountability for all matters falling within the jurisdiction of the Department of Justice." 38 Fed. Reg. 30739 (quoted in *United States* v. *Nixon*, *supra*, 418 U.S. at 694 n.8).[2] In contrast, the current Attorney General's regulation purports to delegate the Attorney General's full and final authority to the independent counsel without regard to the Attorney General's statutory accountability. It is that very delegation of final authority, which was not at issue

[2] This limitation was no doubt in recognition of 28 U.S.C. § 516, which provides that the Attorney General is responsible for the direction of all litigation in which the United States is interested.

in *Nixon*, that is at issue here. Respondent's analogy to Watergate and his reliance on *United States* v. *Nixon*, *supra*, are therefore wholly misplaced. In fact, the differences between the two regulations highlight the problems with the current regulation. The critical issue presented remains unresolved by this Court.

B. Petitioner has argued that an independent counsel exercising the full and final law enforcement authority of the Attorney General is a "superior" Officer who must, like the Attorney General, be appointed by the President with the advice and consent of the Senate. Because Attorney General Meese's regulation purports to allow the Attorney General to appoint such an Officer, petitioner asserts, it is unconstitutional. Only if the regulation is construed to vest ultimate control in the Attorney General or the President may it be deemed constitutional. Moreover, petitioner maintains, the notable absence of law in this vital area renders the issue appropriate for review by this Court.

Respondent counters that the independent counsel is an "inferior Officer" as long as the Attorney General retains some limited power to rescind the regulation under some undefined circumstances, and that his appointment by the Attorney General was therefore proper. He expends considerable effort asserting that an independent counsel need not be subordinate to, or removable at will by, any other Executive Officer in order to be an "inferior Officer," *see* Opp. to Pet. for Cert. at 15, and he in fact applauds the "safeguards of independence built into" the regulation, *id.* at 21 n.14, which, he states, "preclude[s]" "actual subservience to the Attorney General." *Id.*[3]

In notable contrast, the Solicitor General adopts the separate view of Judge Williams below and argues that

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[3] This, of course, is precisely petitioner's point. Any regulation that precludes "actual subservience," either through the chain of authority or at-will removability, cannot possibly create merely an "inferior Officer."

the independent counsel is an "inferior Officer" because the Attorney General retains full and unreviewable authority to rescind the regulation. (It is, of course, the panel majority's failure to construe the regulation along the lines now advanced by the Solicitor General, in order to render it constitutional, that forms the heart of petitioner's challenge to the decision below). *See* Brief for the United States as Amicus Curiae at 8-9. These different views of the merits of petitioner's argument do not, of course, render the issue presented inappropriate for review. To the contrary, they highlight the broad range of opinion on the proper interpretation both of the regulation at issue and of the term "inferior Officer" in the Appointments Clause and underscore the necessity for clarification by this Court.

In a curious effort to minimize the importance of the question presented, respondent suggests that petitioner seeks only an advisory opinion "on the scope of judicial review of a hypothetical revocation of the regulation . . . ." Opp. to Pet. for Cert. at 13 n.7. This is a gross mischaracterization, as the Brief for the United States makes clear. The nature and extent of the independent counsel's subservience to the Attorney General is crucial to the determination whether the independent counsel is an "inferior" or a "superior" Officer and therefore whether he is lawfully appointed. The *only* conceivable source of Executive control over the independent counsel is in the ability to revoke the regulation. If that ability is circumscribed, so, too, is Executive control over the independent counsel's exercise of Executive power. The issues of authority, independence and removability are inextricably intertwined, and respondent's effort to isolate one from the remainder is entirely misplaced.

3. Respondent merely quotes the analysis of the court of appeals to demonstrate that that court's ruling on 28 U.S.C. § 515 is correct—while omitting the caveat that the D.C. Circuit found the issue to be "less than perfectly clear." App. 15a. The court's analysis was seri-

ously flawed when set forth by the court of appeals and remains seriously flawed. Respondent offers no reason why the associate counsel and his office somehow are different from, and need not be treated like, any other special attorneys in the Department of Justice. He offers no reason why § 515 case law from other circuits is inapposite. And he offers no explanation for the far from "self-evident" proposition that an office established under the Attorney General's regulation within the Department of Justice is not "a new and different Office of Independent Counsel, separate and distinct from the Office that already was in existence under the [Ethics in Government Act.]" Opp. to Pet. for Cert. at 17.

Most notably, respondent fails to explain how the associate counsel can possibly be acting as Officers of the Department of Justice without ever receiving appointments or acknowledging their status as Officers of that Department.[4] The simple fact is that it makes a big difference—one glossed over by the court of appeals, respondent, and the Solicitor General—whether or not the associate counsel are Officers of the Department of Justice. Under the independent counsel provisions of the Ethics in Government Act, 28 U.S.C. §§ 591 *et .seq* ("Ethics Act"), associate counsel are independent of the Department of Justice and its regulations, including the conflict of interest laws covering Justice Department Officers. Under the Attorney General's regulation, however, associate counsel cannot be free from such re-

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[4] The Solicitor General errs when he states that under the regulation Mr. Walsh "appointed associates to assist him," and that the court of appeals "properly declined to invalidate the appointment of respondent's assistants under the Attorney General's regulations . . . ." Brief for the United States at 5, 11-12. The record is clear that there never were any appointments or acknowledgments of such. The court of appeals declined to require that there be appointments; it certainly did not decline to "invalidate" what never existed.

straints.[5] Section 515 resolves this issue in the routine case by requiring that special attorneys—even attorneys already employed by other agencies within the Executive Branch—have a written record of their assignment to and duties within the Department. Associate counsel have created no such record, have never acknowledged that they act as Officers of the Department, and cannot be said to be bound to those provisions.

4. The position advanced by the Solicitor General—that the Attorney General has full and unreviewable authority to revoke the regulation and thereby remove the independent counsel at will—highlights the applicability

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[5] Perhaps for this reason, the independent counsel has maintained that he and his staff are *outside* the Department of Justice even under the regulation. *See* App. 12a n.31.

The Department of Justice, in contrast, long has maintained that not only the regulation but also the Ethics Act places associate counsel *within* the Department, rendering them subject to the conflict of interest provisions. For that reason, the Department might not have felt concerned at the failure of associate counsel to acknowledge those same duties twice, by taking a second oath to an office within the Department of Justice. The Department has now been proved wrong, however. The new independent counsel statute, signed into law on December 15, 1987, makes clear that, effective immediately, no associate counsel, including those in ongoing investigations, may be deemed Officers of the Department under the Ethics Act for purposes of the statutory conflict of interest provisions. *See* Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191 (text available in H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. (1987)). As a result, under no possible interpretation of the appointment affidavits and oaths sworn under the Ethics Act may it be claimed that associate counsel operate in the same capacity under the Ethics Act and under the Attorney General's regulation, or that they ever have taken oaths to an office within the Department of Justice.

In light of the new Act, should the Court decide not to grant certiorari on the lawfulness of the Attorney General's regulation, it would appear appropriate for the case to be remanded for reconsideration in light of the amendments to the Act, which resolve a controversy over the relationship between the comparative duties and obligations of the associate counsel under the two sources of authority.

of *Bowsher* v. *Synar*, 106 S.Ct. 3181 (1986) to this case. Under the Ethics Act, the independent counsel is insulated from control by the Attorney General by the provision allowing a court to review any removal decision, presumably *de novo* and to reinstate the independent counsel over the objection of the Attorney General. 28 U.S.C. § 596(a)(3) (App. 97a). For all intents and purposes, that review provision requires that the Attorney General apply for and receive permission from the Judicial Branch before discharging the independent counsel. By placing the ultimate decision with the court, that provision removes any subservience of the independent counsel to the Attorney General and renders the independent counsel's relationship to the court the only one that matters.

In contrast, the Attorney General's regulation (as construed by petitioner and the Solicitor General) renders the Attorney General fully accountable for the activities of the independent counsel to the extent it gives him full and unreviewable authority to terminate the independent counsel's office; this authority to remove at will overrides the more limited removal provisions of the regulation and essentially renders them a sham. As long as the Ethics Act remains in force, however, the ability of the Attorney General to control is illusory. If a court retains essentially unfettered power to reinstate the independent counsel, the Attorney General's action is meaningless, and he is rendered impotent.

The hypothetical advanced by the Solicitor General (at 13-14) proves the point. Suppose, as the Solicitor General suggests, a court takes a United States Attorney, who is accountable to and removable at will by the Attorney General, and appoints him to be independent counsel and to continue his investigations in that capacity. Thereafter, any effort by the Attorney General to exercise control may be countermanded by the court. The result is to free an Officer from the line of authority in which he normally operates and to render him beholden

only to a court. The purpose and effect of such an appointment would be the same—to sever any and all allegiance to the Department of Justice and to replace it with the protection of the judiciary. An Ethics Act appointment has just that purpose and effect.

Finally, the distinction between this case and *Bowsher* advanced by the Solicitor General—between the power to remove and the power to reinstate (at page 12)—is not one that makes any substantive difference at all. In this case, as in *Bowsher*, the branch of government responsible for executing the laws is deprived of control over that function. In *Bowsher*, Congress allowed the Executive to appoint its own Officer but retained the removal power for itself. Here, Congress has removed from the Executive the power to appoint and has given the judiciary the power to second-guess any removal decision. One would surely have thought that the Executive would balk, on separation of powers grounds, if Congress were to authorize a court to review *de novo* a decision to remove the Secretary of State, or a foreign ambassador, and to reinstate either of them at will over the objection of the Executive. Yet the difference between that case and this one, if there is one, is not readily apparent.

CONCLUSION

For these reasons and the reasons stated in the petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1987

OLIVER L. NORTH, PETITIONER

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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APP

QUESTIONS PRESENTED

1. Whether the Attorney General may delegate his litigation authority by regulation to an independent counsel he appoints, if he retains the authority to rescind the regulation.

2. Whether the failure to execute duplicative appointment documents and oaths for the assistants to the Independent Counsel defeats their authority to perform, under the Attorney General's regulations, the same functions they are already performing under the independent counsel provisions of the Ethics in Government Act.

3. Whether, in light of the Attorney General's parallel appointment of respondent as Independent Counsel, the district court and the court of appeals correctly declined to reach the merits of petitioner's constitutional challenge to the independent counsel provisions of the Ethics in Government Act.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

Petitioner is challenging the authority of Independent Counsel Lawrence E. Walsh to conduct the "Iran/Contra" probe. The Independent Counsel is conducting his investigation under two separate grants of authority: an appointment made by a court pursuant to the Ethics in Government Act of 1978 (Ethics Act), Tit. VI, 28 U.S.C. (& Supp. III) 591 *et seq.*, and an appointment made by the Attorney General pursuant to regulations that the Attorney General has promulgated, 28 C.F.R. 600.1-600.5, 601.1.[1]

The United States is in complete accord with the goal underlying the independent counsel provisions of the

[1] Since the time of respondent's appointment, the independent counsel provisions of the Ethics Act have been replaced by new, substantially similar legislation. See Independent Counsel Reauthorization Act of 1987, Pub. L. No. 100-191. The prior version of the statute continues to govern this case. See 28 U.S.C. 598.

Ethics Act: to assure integrity in the investigation and, where appropriate, prosecution of violations of law by high-level officials of the Executive Branch. At the same time, however, we note that serious questions regarding the constitutionality of these provisions have cast a cloud over investigations conducted pursuant to that authority.[2]

In order to ensure that the "Iran/Contra" investigation would go forward unhampered by these unresolved constitutional questions, the Attorney General made a parallel appointment of respondent to a position within the Executive Branch and empowered him to conduct his investigation under the authority of that appointment. The Attorney General made the parallel appointment by first establishing by regulation the "Office of Independent Counsel: Iran/Contra" within the Department of Justice. He then appointed respondent as Independent Counsel in charge of that Office, vesting him with the responsibility to investigate the same activities that respondent is authorized to investigate under the auspices of the Ethics Act. See Pet. App. 53a-62a; 28 C.F.R. 600.1-600.5, 601.1; 52 Fed. Reg. 7270-7273, 9241 (1987).

The United States has an interest in defending the validity of the Attorney General's regulations and the separate appointment of respondent as Independent Counsel within the Justice Department pursuant to those regulations. The district court and the court of appeals have upheld the validity of that appointment. Because the regulations promulgated by the Attorney General empower respondent to proceed with the same investigative and prosecutorial activities that are authorized under the Ethics Act, it is our view that there is no need for this Court to reach the separate issue of the constitutionality of the Ethics Act in this case.

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[2] The Executive Branch has recently argued as amicus curiae in *In re Sealed Case*, No. 87-5261 (D.C. Cir. argued Sept. 16, 1987), that these provisions are unconstitutional.

STATEMENT

1. On December 4, 1986, the Attorney General applied for the appointment of an Independent Counsel under the Ethics Act, 28 U.S.C. 591(c), to investigate potential criminal violations involved in the transfer of arms to Iran and the disposition of the proceeds from that transfer. In accordance with that application, a Special Division of the United States Court of Appeals for the District of Columbia Circuit (see 28 U.S.C. 49) appointed respondent as Independent Counsel under the Ethics Act on December 19, 1986, to investigate the matter (Pet. App. 3a).

On February 24, 1987, petitioner filed a civil action in federal district court seeking to enjoin the investigation. Petitioner alleged that the independent counsel provisions of the Ethics Act violate the separation of powers doctrine by infringing the prerogatives of the Executive Branch. In response, on March 5, 1987, the Attorney General by regulation created within the Department of Justice the "Office of Independent Counsel: Iran/Contra." That office was given the authority to investigate the same activities that are subject to the investigation proceeding under the Ethics Act. The Attorney General appointed respondent to the position of Independent Counsel under the regulations. Pet. App. 4a-6a.

The Attorney General exercised that authority in part because, as he explained, "[t]he President has made clear that he supports a full investigation into the events that the Independent Counsel has been charged with investigating under that Act * * * [and, in] light of the President's views, I have found it advisable to assure the courts, Congress, and the American people that this investigation will proceed in a clearly authorized and constitutionally valid form regardless of the eventual outcome of the *North* litigation." Pet. App. 76a.

The Attorney General emphasized that this separate appointment was in no way "meant to question the independence or authority of the Independent Counsel appointed under the Act or to interfere in any way with his activities." To the contrary, the appointment was "intended to make certain that the necessary investigation and appropriate legal proceedings can proceed in a timely manner." Pet. App. 76a-77a. To meet that objective, the Attorney General explained that he was issuing the new regulations under the authority vested in him pursuant to "28 U.S.C. 509, 510, and 515, and 5 U.S.C. 301, and pursuant to the President's general responsibility to enforce the laws of the United States pursuant to Article II of the United States Constitution." Pet. App. 76a, 77a.

The regulations vest the Independent Counsel, with respect to all matters in his prosecutorial jurisdiction, with the "full power and independent authority to exercise all investigative and prosecutorial functions" of the Department of Justice and the Attorney General, with the exception of matters requiring the Attorney General's personal attention under 18 U.S.C. (& Supp. III) 2516. Pet. App. 78a. The Independent Counsel's powers include, among other activities, conducting grand jury proceedings, applying for grants of immunity, signing indictments, initiating prosecutions, and conducting all necessary civil and criminal litigation. *Id.* at 78a-79a.

In addition, the Attorney General's regulations empower the Independent Counsel "to appoint, fix the compensation, and assign the duties, of such employees as the Independent Counsel deems necessary" (Pet. App. 80a). The regulations specify that the Independent Counsel shall, "except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws" (*id.* at 81a). The Attorney General's regulations also provided that, as under the Ethics Act, the Independent Counsel can be re-

moved on circumscribed grounds only. With respect to the Iran/Contra investigation, the regulations authorize respondent to investigate the same matters that were assigned to him under the Ethics Act. *Id.* at 82a-83a.

2. Respondent accepted the appointment by the Attorney General on March 5, 1987. He appointed associates to assist him, and since then has been actively conducting an investigation of the "Iran/Contra" matter. All of the associates he appointed to assist him in performing his duties under the regulations were individuals he had appointed to assist him in performing his duties under the Ethics Act. Each of the associates signed an oath of office at the time he began assisting respondent with his duties under the Act. The associates did not sign separate oaths of office in connection with their duties under the regulations (Pet. App. 48a).

Subsequent to respondent's appointment by the Attorney General, the grand jury investigating the Iran/Contra matter issued a subpoena to petitioner. Petitioner refused to comply with the subpoena and was accordingly held in contempt by the federal district court that was supervising the grand jury. Pet. App. 7a. On appeal of the contempt order, the court of appeals ruled that petitioner's challenge to the validity of respondent's status as prosecutor was ripe. *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). It remanded the matter to the district court for a determination of whether respondent's parallel appointment by the Attorney General made it unnecessary to reach the constitutional challenges petitioner wished to raise against respondent's status under the Ethics Act (Pet. App. 66a-75a).

3. On remand, the district court ruled that the Attorney General's parallel appointment of respondent is valid, and that appropriate authority has been vested in respondent and his assistants (Pet. App. 42a-51a). The district court found that the Attorney General has the

authority to create, by regulation, independent counsels and to grant them the degree of independence established under the regulations (*id.* at 45a-46a). The court also ruled that respondent's appointment by the Attorney General is to a position within the Department of Justice, and that the appointment is consistent with the terms of the Ethics Act (*id.* at 47a-48a). Finally, the district court determined that the authority to conduct criminal proceedings has been properly vested in respondent's assistants. In light of the "unique set of circumstances" posed here, the court found that the affidavits that the assistants had signed accepting appointment under the Ethics Act were sufficient to meet any technical appointment requirements under the regulations. *Id.* at 47a-49a.

4. On the second appeal, the court of appeals affirmed the district court's holding (Pet. App. 27a). The court of appeals upheld the statutory authority of the Attorney General to delegate authority as he did here, and it confirmed that respondent's office under the regulations is part of the Department of Justice (*id.* at 11a-12a). The court also ruled (*id.* at 12a-14a) that the Attorney General's action was constitutionally valid. Rejecting petitioner's challenges to the appointment, the court held that the regulations properly created respondent's position as an "inferior Officer" of the United States, since the regulations (and respondent's authority under them) can, "[s]ubject to generally applicable procedural requirements," be rescinded by the Attorney General "at any time." *Id.* at 13a.

The court also rejected petitioner's argument that respondent's assistants had not properly been appointed to their offices. It agreed with the district court that, under the particular circumstances posed here, requiring the assistants to take oaths and complete forms essentially duplicating those executed under the Ethics Act would serve no purpose. Pet. App. 15a-17a. The court of appeals

also found that respondent and his assistants had been "specifically directed" by the Attorney General to perform the tasks assigned to them, as is required by 28 U.S.C. 515(a) (Pet. App. 17a-19a).

Finally, the court of appeals found that no aspect of respondent's tenure under the Attorney General's regulations and under the Ethics Act required the court to reach the constitutional challenges made by petitioner against the Act (Pet. App. 20a-27a). The court concluded that the fact of potential judicial review of any removal under the Ethics Act does not have a sufficient current impact on respondent to justify adjudication of the constitutional issues petitioner wishes to raise (*id.* at 22a-23a).[3]

ARGUMENT

The nub of the controversy in this case is whether the courts should address in this litigation the constitutional challenges that petitioner wishes to make against respondent's authority under the Ethics Act to investigate and, if appropriate, prosecute him. The Attorney General appointed respondent to a parallel position within the Department of Justice in order to make it possible for the Iran/Contra investigation to proceed without the threat of disruption by a successful constitutional challenge to the Ethics Act.[4] In light of the Attorney General's appoint-

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[3] In partial dissent, Judge Williams took the view that because the Attorney General could rescind the regulations at any time, respondent's tenure under the regulations is different from his tenure under the Ethics Act (Pet. App. 28a-31a). Therefore, Judge Williams concluded, the court of appeals was required to reach the merits of petitioner's constitutional challenges to the Ethics Act (*id.* at 32a-41a).

[4] There is a case currently pending in the court of appeals that raises the question of the constitutionality of the Ethics Act. *In re Sealed Case*, No. 87-5261 (D.C. Cir. argued Sept. 16, 1987). The constitutional issue is before the court in that case because the Independent

ment, respondent currently has two independent grants of authority to investigate petitioner, the Ethics Act and the Attorney General's regulations. Only if the appointment under the regulations is invalid would it be necessary to consider the substantial constitutional questions posed by the Ethics Act. We submit that the regulations and respondent's appointment are valid and that it is therefore both proper and advisable for the Court to decline petitioner's invitation to address the difficult constitutional questions raised by the Ethics Act. See *Jean* v. *Nelson*, 472 U.S. 846, 854 (1985); *Ashwander* v. *TVA*, 297 U.S. 288, 346-348 (1936) (Brandeis, J., concurring).

1. Petitioner first challenges the constitutionality of the Attorney General's regulations (Pet. 9-16). He bases his claim on the assumption that a decision by the Attorney General to rescind the independent counsel regulations would be reviewable on the merits in court. If that is so, petitioner claims, the Independent Counsel is sufficiently free from the Attorney General's control that he cannot be considered an "inferior Officer" within the meaning of the Constitution. In other words, petitioner's claim is that the Attorney General has by error created an office that is independent to such an extent that its occupant must be appointed by the President with the approval of the Senate. See U.S. Const. Art. II, § 2, Cl. 2.

Contrary to the premise of petitioner's argument, rescission of the Attorney General's regulations creating the "Office of Independent Counsel: Iran/Contra" would not be reviewable under the Administrative Procedure Act, because the matter has been committed to the Attorney General's discretion by law. See 5 U.S.C. 701(a)(2). First, as Judge Williams pointed out in his concurring opinion

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Counsel conducting that investigation declined to accept the Attorney General's offer of a parallel appointment, an offer that the Justice Department has made to all Independent Counsels now serving under the authority of the Ethics Act.

below (Pet. App. 29a), prosecution decisions made by the Executive are "presumptively unreviewable" (*Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985)), and are committed to the Executive's discretion, with only the most modest constraints. *Wayte* v. *United States*, 470 U.S. 598, 607 (1985). Second, Congress has accorded the Attorney General the authority to delegate his responsibilities, to appoint assistants, to appoint persons to assist the United States attorneys, and to appoint persons to conduct investigations of criminal and other matters. See 28 U.S.C. (& Supp. III) 510, 515-519, 533, and 543. Congress has not imposed any substantive restrictions on the Attorney General's authority to assign such duties to others and to terminate those assignments; accordingly, there is no "law to apply" that would provide the courts with a basis for reviewing the Attorney General's decisions on such matters, including his decision to make a delegation by regulation or to revoke the delegation by rescinding the regulation. See *Chaney*, 470 U.S. at 833-834.[5]

2. Petitioner next argues (Pet. 17-23) that the technical requirements for authorizing attorneys to conduct federal investigations and prosecutions were not met in this case.

The district court and the court of appeals determined that respondent's assistants were not required to execute essentially duplicative oaths and forms in order to carry out the same functions within the Justice Department under the Attorney General's regulations that they were

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[5] If rescission of the regulation is reviewable, that would suggest that its promulgation was also reviewable. See *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-42 (1983). Yet it is clear that there is no basis to review the issuance of such a regulation.

We note in addition that this Court has upheld the exercise of similarly independent investigative authority by an officer created by the Attorney General's regulation, without in any way suggesting that the Attorney General's delegation was unconstitutional. *United States* v. *Nixon*, 418 U.S. 683 (1974).

already performing under the Ethics Act (Pet. App. 15a-20a, 48a-49a). The reasoning used by both courts is correct and is in no way in conflict with the rulings in the two appellate cases cited by petitioner (Pet. 22), which upheld delegations of authority to federal prosecutors. *United States* v. *Prueitt*, 540 F.2d 995, 1000-1001 (9th Cir. 1976), cert. denied, 429 U.S. 1063 (1977); *In re Persico*, 522 F.2d 41, 56-67 (2d Cir. 1975). The issue in those cases was whether particular attorneys had been properly appointed and "specifically directed" (28 U.S.C. 515(a)) to perform particular tasks. The courts found that the attorneys had been properly designated and directed.

Nothing in the two court of appeals decisions on which petitioner relies suggests that respondent's assistants cannot serve in the "Office of Independent Counsel: Iran/Contra" without further direction from the Attorney General or without executing a new oath following respondent's appointment to that Office. The court of appeals properly held that the specific direction provided to the Independent Counsel under the Attorney General's regulations was sufficient to satisfy the requirement of 28 U.S.C. 515(a) that the attorneys assisting the Independent Counsel be "specifically directed" to perform certain Executive Branch functions. Pet. App. 17a-19a. That is particularly true in view of the fact that the purpose of the "specifically directed" provision was not to protect criminal defendants and prospective defendants, but to protect the government against the risk that specially appointed attorneys would engage in activities beyond the scope of their intended commissions. For that reason, the provision has traditionally been given a liberal construction in favor of the validity of the executive action at issue. See *United States* v. *Balistrieri*, 779 F.2d 1191, 1207-1210 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986); *United States* v. *Prueitt*, 540 F.2d at 1002-1003; *In re Persico*, 522 F.2d at 58-63; *Wall* v. *United States*, 384 F.2d 758, 763

(10th Cir. 1967); *United States* v. *Denton*, 307 F.2d 336, 338 (6th Cir.), cert. denied, 371 U.S. 923 (1962); *Shushan* v. *United States*, 117 F.2d 110 (5th Cir.), cert. denied, 313 U.S. 574 (1941).

Beyond that, the regulations authorize the Independent Counsel to appoint and assign the duties of such employees as he deems necessary to perform his designated functions. 28 C.F.R. 600.1(c). The Attorney General is authorized by statute to delegate his functions to others within the Department of Justice (28 U.S.C. 510) including his responsibility to appoint and "specifically direct[]" the activities of special attorneys. The Attorney General has previously delegated those responsibilities with respect to special attorneys performing services within other components of the Department. See 28 C.F.R. 0.13, 0.15(b)(1)(ii). The assignment to the Independent Counsel of the responsibility for appointing and assigning attorneys to assist him constitutes a permissible delegation of the Attorney General's responsibility under Section 515(a), and thus satisfies the requirement that special attorneys be "specifically directed by the Attorney General" to perform the tasks assigned to them.

The court of appeals was also correct in concluding that the failure of respondent's assistants to take a new oath of office after respondent's appointment by the Attorney General does not render unlawful their service under the authority of the Attorney General's regulations. Because the Independent Counsel's responsibilities under the Ethics Act and under the Attorney General's regulations are identical, the oaths of office taken by respondent's assistants pursuant to their appointments under the Ethics Act are substantively identical to the oaths they would have taken under the Attorney General's regulations. Under those circumstances, where the responsibilities of the two offices are entirely congruent, the court of appeals properly declined to invalidate the appointment of respondent's

assistants under the Attorney General's regulations on the ground that they failed to execute a duplicate oath of office in connection with their duties under the regulations.

3. Finally, petitioner contends (Pet. 23-27) that the court of appeals erred by not addressing his attacks on the validity of the Ethics Act, because of the allegedly different tenure provisions for respondent under the regulations and under the Ethics Act.

The tenure provisions in the two schemes are essentially the same; the difference between them arises from the fact that the Attorney General can rescind the regulation, thereby eliminating the regulatory tenure provision, while under the Ethics Act the Attorney General's decision to remove an independent counsel is subject to review by the Special Division of the court of appeals. 28 U.S.C. (& Supp. III) 596(a)(3). Petitioner argues that in light of this distinction, the court of appeals was wrong in ruling that petitioner's constitutional challenges are not ripe, and that the court's ruling is at odds with this Court's decision in *Bowsher* v. *Synar*, No. 85-1377 (July 7, 1986).

This case is not like *Bowsher*. The question there was whether the Comptroller General, who is removable by Congress, can carry out Executive Branch functions. The Court held that an officer's removability by one Branch prevents the officer from exercising the functions of another Branch, because the fact of removability "dictate[s] that he will be subservient to" the Branch with the removal power (slip op. 14). For that reason, the Court found that the issue of removability was critical to the question of the constitutionality of the statute at issue in the case, even though no steps had been taken to remove the Comptroller General.

Unlike the situation with the statute at issue in *Bowsher*, the hypothetical removability of the Independent Counsel under the Attorney General's regulations does not affect the constitutionality of those regulations and the In-

dependent Counsel's appointment under them. The person who would remove the Independent Counsel—either under the terms of the regulations or by rescinding them—would be the Attorney General, a member of the same Branch as the Independent Counsel. The constitutional flaw that was present in *Bowsher*—the fact that an officer performing functions for one Branch was removable by representatives of another Branch—is therefore not present in the case of the Attorney General's regulations. Because the Attorney General's regulations provide a valid basis for the Independent Counsel's exercise of prosecutorial and investigative authority—at least unless and until the Independent Counsel is removed by the Attorney General—the Ethics Act is simply an alternative basis for the Independent Counsel's exercise of authority.

Petitioner's argument appears to be that in spite of the Attorney General's parallel appointment—and even assuming that the parallel appointment is valid—the existence of respondent's appointment under the Ethics Act is sufficient to poison respondent's status by making him and his assistants beholden to the Judicial Branch. For that reason, petitioner contends, it was improper for the court of appeals to decline to reach the question of the constitutionality of the Ethics Act.

The answer to this contention is that the Attorney General's appointment renders the Ethics Act appointment superfluous and thus makes the question of the constitutionality of the Act unnecessary to the resolution of this case. Even if the court of appeals had addressed the issue of the constitutionality of the Act, the outcome of the case would have been the same: because of respondent's separate appointment under the Attorney General's regulations, petitioner would still be compelled to comply with respondent's subpoena and would still be properly subject to contempt for failing to do so. The only

consequence of requiring the court of appeals to resolve the difficult constitutional questions presented by the Ethics Act would be to cause a substantial delay in the disposition of the subpoena controversy.

The fallacy in petitioner's argument becomes clear by the use of a simple example. Suppose the Ethics Act permitted the court to appoint a sitting United States Attorney as an independent counsel. Suppose futher that the court appointed a United States Attorney as the independent counsel to investigate a particular matter, which the United States Attorney was already investigating in his capacity as a Department of Justice official. Would the Ethics Act appointment render the United States Attorney "subservient to" the Judicial Branch, so that a constitutional flaw in the Ethics Act would invalidate the performance of his duties as a United States Attorney? We think not. The United States Attorney would be entitled to continue his investigation because of his status as an Executive Branch official, regardless of any constitutional infirmity in the Ethics Act. And because the validity of the investigation would not be affected by the resolution of the constitutional issue, there would be no reason for the courts to reach out to decide that issue if it were raised by a target of the investigation.

The same analysis applies to the Independent Counsel, who has been validly authorized to conduct an investigation within the Department of Justice, regardless of the constitutionality of his appointment under the Ethics Act. It is therefore unnecessary and inappropriate to address the constitutionality of the provisions of that Act in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Assistant Attorney General
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No. 87-869

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

OLIVER L. NORTH,
Petitioner,

v.

LAWRENCE E. WALSH, INDEPENDENT COUNSEL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 22.6 of the Rules of this Court, petitioner files this supplemental brief to bring to the Court's attention newly discovered evidence that bears on the second Question Presented in the Petition for a Writ of Certiorari. The evidence directly contradicts a factual finding of the court of appeals and establishes that the courts below seriously erred when they categorically refused to allow petitioner to take evidence. In light of this new evidence, at the very least a remand is appropriate to allow compilation of the evidentiary record petitioner repeatedly has sought and been denied.

In the district court and the court of appeals, petitioner argued that the associate counsel could not purport to act pursuant to the Attorney General's regulation because the independent counsel and his staff had taken none of the steps required by 28 U.S.C. § 515 to effectuate their appointments thereunder. Petitioner further argued that the Department of Justice had at the time of issuance interpreted its own regulation—consistent with what petitioner contends is required by § 515—to require associate counsel to take certain steps to effectuate their appointments, and that that interpretation was due considerable weight. As indicated in the petition, petitioner relied on a March 13, 1987 letter from Associate Attorney General Stephen S. Trott to Independent Counsel Walsh, in which he outlined the steps to be taken "[i]n order to effectuate the appointment of your staff" under the regulation promulgated on March 5, 1987. *See* Pet. at 7 n.2; App. to Pet. at 100a.

Despite repeated efforts by petitioner to take evidence or testimony on other, additional efforts by the Department to compel Independent Counsel Walsh to effectuate the appointments at issue,[1] the district court refused to allow an evidentiary hearing of any kind. Instead, it accepted as a full record an affidavit of Associate Independent Counsel Guy Miller Struve, sworn to on June 29, 1987, and filed with the district court in this case. That affidavit stated in relevant part as follows:

> 6. On March 5, 1987, Mr. Walsh accepted the appointment by the Attorney General by taking the Oath of Office as Independent Counsel within an

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[1] The district court pleadings, which are a part of the record in the court of appeals, are replete with petitioner's efforts to take evidence on this precise issue. In the court of appeals, petitioner again argued that the evidentiary record on this issue was incomplete. In the petition, the absence of an evidentiary hearing is noted as well (at page 5).

> agency designated on the appointment form as Office of Independent Counsel: Iran/Contra (Exhibit 5 hereto).
>
> 7. On March 13, 1987, Associate Attorney General Stephen S. Trott wrote to Mr. Walsh, stating that Mr. Walsh's staff should complete affidavit of appointment forms and be sworn in and that the affidavits should be sent to the Justice Department (Exhibit 6 hereto). Associate Counsel did not execute new affidavits of appointment as requested by the Associate Attorney General, and the Department of Justice was so informed.

The affidavit left the distinct impression that the matter ended with the Trott letter and Mr. Walsh's response thereto. In July, the Department of Justice reinforced that impression when it informed the district court that the Department had suggested that certain steps should be taken only because it had not known that associate counsel had executed appointment affidavits under the Ethics in Government Act, 28 U.S.C. § 591 *et seq.*[2]

In reliance on the apparent suggestion that the Department of Justice never had followed up, the court of appeals rejected petitioner's argument that the Department's official position, as stated in the Trott letter, underscored the fact that the associate independent counsel never had properly effectuated their "parallel appointments." The court observed:

> The record contains no evidence that Walsh's associate counsel have taken any actions pursuant to Trott's request. North contends that the associate counsel therefore may act only in accordance with their previous appointments by the Special Division. Accordingly, North argues, any legal authority they

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[2] Transcript of Proceedings at 32 (July 1, 1987). The transcript of proceedings in the district court is part of the record in the court of appeals.

> possess proceeds from the Ethics [in Government] Act, and not from the regulation.

App. to Pet. at 16a.[3] But, it concluded, in this particular case associate counsel had done enough. As to the Trott letter, the court stated: "*There is no evidence in the record that the Department ever renewed the request made in General Trott's letter of March 13*, although it never received the affidavits as requested." App. to Pet. at 17a n.40 (emphasis supplied).

A document produced on January 4, 1988, by the Department of Justice in response to petitioner's Freedom of Information Act request[4] confirms that the court of appeals was led to an erroneous conclusion. The document (set out in the Appendix hereto) establishes that on May 18, 1987, two months after the Trott letter, and one month after this litigation began, the Department of Justice still took the position set out in the Trott letter

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[3] In fact, petitioner had more broadly argued that 28 U.S.C. § 515 (and not the Trott letter) required that certain steps be taken that had not been taken. Petitioner relied on the Trott letter only as evidence that the Department of Justice properly understood the mandate of § 515.

[4] On August 10, 1987, petitioner filed requests under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, with the Office of Independent Counsel (Walsh) and the Department of Justice seeking documents relevant to the parallel appointments, among other issues. On October 2, 1987, the earliest date permitted by statute, petitioner filed a complaint under FOIA in the United States District Court for the District of Columbia challenging the failure of the Office of Independent Counsel (Walsh) and the Department of Justice to disclose within the statutory time period documents responsive to petitioner's FOIA requests. Since that time the Department of Justice has made available numerous documents to petitioner (while withholding others in whole or in part), including, on January 4, 1988, the document at issue here. In contrast, respondent Walsh has refused to release any documents and has asserted that petitioner has no right, under FOIA, to the release of any documents.

and did, in fact, renew its request. The document discloses that on May 14, 1987, the Department again contacted the office of Independent Counsel Walsh to ask that his associate counsel take the necessary steps to effectuate their appointments. That was two days after Independent Counsel Walsh first had represented in this litigation that he and his associate counsel were acting pursuant to the Attorney General's regulation (and that there therefore was no need to address the constitutionality of the independent counsel provisions of the Ethics in Government Act) and one day after petitioner had responded that there was no evidence of any actual "parallel appointments." The document establishes that Independent Counsel James C. McKay complied with the Department's request, but that respondent Walsh continued to refuse to do so. As the document puts it, "Independent Counsel Walsh is concerned about the parallel appointment of his staff and intends to discuss his concerns with Associate Attorney General Trott." Whether additional relevant documents exist is, of course, completely unknown. What is certain is that, had the court of appeals been confronted with what, it is now clear, was an about-face by the Department after this litigation arose, it might well have given more serious consideration to the "pre-litigation" position of the Department. But because petitioner was prohibited from making a factual record, the court had no opportunity to consider the issue properly.

Perhaps more importantly, the document also indicates that as of May 1987, one month *after* the subpoena in this litigation was issued, in his own eyes respondent still had not effectuated the "parallel appointment" of his staff because he remained "concerned" about any such appointments. This evidence surely casts serious doubt on the conclusion of the court of appeals that the subpoena was issued by associate counsel acting under authority of the Attorney General's regulation (and not the

Ethics in Government Act). To this day, in fact, there is no evidence that associate counsel ever have received or accepted appointments under the regulation. Under these conditions, the reliance of the courts below on the authority of associate counsel under the Attorney General's regulation, in order to avoid reaching the merits of petitioner's challenge to the Ethics in Government Act, is certainly subject to new question. The document sharply undermines the decision below and compels its reconsideration.

In sum, at a minimum the newly released document establishes that the record on which the district court and court of appeals relied omitted significant information and certainly was not complete. In addition, the document states that associate counsel in fact had not received parallel appointments, and were not acting under authority of the regulation, when the subpoena in question issued.[5] As a result, some 30 lawyers today continue to exercise the extraordinary investigative and prosecutorial power of the state against petitioner and others without any certain source of authority to do so. Under these circumstances, if this Court decides to deny certiorari on the facial constitutionality of the Attorney General's regulation, it would seem appropriate for this Court to grant the petition and remand for compilation of a full and accurate record on the § 515 issue. Given the now-strong likelihood that the existing record in this case is sorely incomplete, and the fact that the district court repeatedly rejected petitioner's efforts to establish

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[5] The document makes clear that no party to the proceedings below took any step to correct the misimpression that had been created in the court of appeals, both as to the absence of further contacts between respondent and Justice on these issues after the Trott letter, and as to the absence of any actual "parallel appointments."

a proper factual record, it would be a true injustice if the rulings on this issue below are allowed to stand.

Respectfully submitted,

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APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
OFFICIAL FILE COPY

May 18, 1987

Parallel Appointments of the Independent Counsel Staffs

Thomas M. Barba
Deputy Assistant Attorney General
Civil Division

John C. Vail
Assistant Director
Personnel Staff
Justice Management Division

As you are aware, we are in the process of regularizing the parallel appointments of the staffs of the Independent Counsel: Iran/Contra and the Independent Counsel *In Re*: Franklyn C. Nofziger.

I have met with Janis Sposato, General Counsel, Justice Management Division to determine the steps necessary to effect the parallel appointments of the staffs. We have concluded that we need, for each staff member, a Standard Form 171, "Application for Federal Employment," a copy of Standard Form 61, "Appointment Affidavit," and for each attorney, a Department Bar Affidavit.

As a follow-up to Associate Attorney General Trott's letter of March 13, 1987 (copy attached), we have contacted the Administrators of both Independent Counsels. Michael Jones, the Administrator for Independent Counsel McKay has provided us with copies of Standard Forms 61, "Appointment Affidavits" for each staff member and is securing the additional needed documentation. I have corresponded with Mr. Jones via a letter of May

6, 1987 (copy attached) and a subsequent meeting on May 13, 1987.

My staff contacted Francis Cuffie the Administrator for Independent Counsel Walsh telephonically on May 14, 1987. Ms. Cuffie informed us that Independent Counsel Walsh is concerned about the parallel appointment of his staff and intends to discuss his concerns with Associate Attorney General Trott. Although Ms. Cuffie is not aware of the specific nature of Independent Counsel Walsh's concerns, she has assured us that she will contact us as soon as he resolves them.

If you desire further information or clarification please contact me on 633-4621.

Attachments

cc: James I.K. Knapp
Deputy Associate Attorney General

VAIL:er:X4621:5-18-87
Diskette: VAIL1: Parallel Appts
Copies furnished: Oser, Vail, File